UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

A.S.V., INC., d/b/a TEREX	)	
	)	
Respondent,	)	
	)	
And	)	
	)	Case Nos. 18-CA-131987
INTERNATIONAL BROTHERHOOD OF	)	18-CA-140338
BOILERMAKERS, IRON SHIP BUILDERS,	)	18-RC-128308
BLACKSMITHS, FORGERS, AND	)	
HELPERS AFL-CIO,	)	
	)	
Charging Party	)	

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TO ADMINISTRATIVE LAW JUDGE

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RESPONDENT'S POST-HEARING BRIEF TO ADMINISTRATIVE LAW JUDGE

NOW COMES A.S.V., Inc., d/b/a Terex, Respondent herein, and files its post-hearing brief. For ease of reading and understanding, this brief is divided into the following sections: (I) Union Organizing Campaign/Section 8(a)(1) Allegations, (II) Section 8(a)(3) Outsourcing and Layoff Issues, and (III) Remedial Issues. Respondent has attempted to anticipate and address arguments of the General Counsel and the Union; however, insofar as they make arguments not addressed in here, that does not signify Respondent's agreement with such arguments.

UNION ORGANIZING CAMPAIGN/SECTION 8(A)(1) ALLEGATIONS

STATEMENT OF FACTS

A. The Paint Department

On May 9, the Union filed two representation petitions with the Regional Director of Region 18 of the National Labor Relations Board seeking to represent two groups of Respondent's employees. One petition sought to represent a group of eleven painters. Respondent and the Union stipulated to the appropriateness of the paint department unit, and an election was conducted on June 18, which the Union won by a vote of ten to one. (GC Exh. 3(b), 3(c)). The Union was certified (GC Exh. 3(d)), Respondent has recognized the Union in this unit, and contract negotiations are in progress. (Resp. Exhs. 5, 6, 7, 8, 9, 10, 11; CP Exh. 14).

B. The Assembly Unit

The second petition sought to represent a group of approximately fifteen "undercarriage" employees. (GC Exh. 4(a)). Respondent contended that this was not an appropriate unit for collective bargaining, and a hearing was conducted on May 20, at which the parties presented evidence. The Regional Director issued a Decision and Direction of Election on May 29, finding the "undercarriage" unit to be inappropriate, and instead directing an election in a unit of approximately 42 assemblers. (GC Exh. 1(m)). Respondent filed a timely request for review with the Board on June 12, contending that the assembly unit was also inappropriate and that employees from welding/fabrication, warehouse, quality, test track, and maintenance should also be included in the unit. The election was conducted as scheduled on June 25, but the ballots were impounded. On June 30, the Board denied Terex's request for review, with one

member dissenting. 360 NLRB No. 138. The ballots were subsequently opened, and the Union lost the election by a vote of 22 to 15, with 2 non-determinative votes being challenged by the Union. (GC Exh. 4(c), (e), (f)) . The Union filed timely objections to the election, which were eventually consolidated by the Regional Director with the pending unfair labor practice complaint. (GC Exh. 1(o)).

C. The Union's Card Signing Campaign

The Union's organizing campaign began in late February, but did not become public and known to Terex until April 7, when handbills were distributed at the facility. The campaign was broad based in its inception and was not restricted to certain departments. The card utilized by the Union contains the following description of its purpose and uses:

> I, the undersigned employee of
> [Print COMPANY NAME]
>
> hereby select the above-named union as my collective bargaining representative. I understand that this is not an application for membership and that this card may be used to gain voluntary recognition from the employer or to gain an election through the National Labor Relations Board or both.

As relevant here, the Union collected 26 total cards from assembly employees. Of these 26 cards, 2 were signed in late February (Helvie and Lake); 13 were signed in March (Solem, Pasek, Murphy, Witte, Nelson, Holm, Peterson, Carey, Baker, Lexvold, Brohman, and Jenson); 5 were signed between April 1 and 5 (Stuber, Payne, G. Erickson, Grife, and T. Erickson), 3 were signed on May 4 and 5 (Olson, Wiese, and Clark); and the final 3 were signed on June 2. (GC Exh. 45(a) – 45(z)).

D. April 7 Through June 18

Although the Union's campaign became known to Respondent on April 7, there are no allegations of unfair labor practices between April 7 and June 18, the date of the paint department election. To the contrary, Respondent conducted a lawful campaign designed to present important information to employees about the issue of unionization. On April 16, in a town hall meeting devoted primarily to business issues, DiBiagio acknowledged the campaign for the first time. DiBiagio advised employees that it was their "choice," but that it was an "important issue," and he encouraged employees to "make sure you make an informed decision." (GC Exhs. 7, 53(a)). Respondent conducted informational meetings with employees in June prior to the June 18 paint department election. (GC Exhs. 9, 10, 52(b)). There are no allegations that Respondent made any unlawful statements in these meetings.

E. June 19 Meeting

The facts regarding the June 19 meeting DiBiagio conducted with the assembly employees are undisputed, as it is conceded that he read a script that he had prepared the night before. (GC Exh. 11). The meeting lasted approximately ten minutes, and DiBiagio did not take questions. DiBiagio recounted the vote from the painter election and stated that he was "not so sure they will be happy down the road with the decision they made" and that the painters "have taken a huge risk." DiBiagio asserted that credibility was everything to him: "If I can't trust you, you are nothing to me. If you can't trust me, I am nothing to you." He talked about what he had done to turn the facility around and queried what the Union had done to earn the employees' trust. He explained that the plant had

lost $36 million over the previous three years, but that “now we are in the black on less volume.” DiBiagio discussed the impossible odds the plant faced based on location, poor transportation, limited supply chain, and shortage of skilled labor. He reminded employees of the visitors who had come through the plant over the years “sizing us up” and stated that the plant had been saved only because of the efforts of both management and the employees. DiBiagio asserted that he had fought for the plant’s existence on a daily basis and characterized the vote by the painters as a “dumbass move” and “unfuckin believable.” DiBiagio stated that Terex had multiple unionized facilities at one time, but that most were gone. He recounted how he had closed four union plants in his career because “unionized facilities simply struggle to remain competitive.” He urged the employees to “face reality” and asked a series of rhetorical questions given the lack of orders and reduced profit: “Do you really think a union is going to get you big pay increases? Do you really think a union is going to get you better benefits or pay less for what you are getting now? Do you really think a union is going to get you a ridiculously expensive pension plan?” DiBiagio asserted that a disruptive strike could, in his opinion, not be survived, and he urged those who opposed the Union to start speaking up. He closed by stating that he hoped the assembly employees were “smart enough not to follow suit and make the same mistake because what you decide will determine the future direction of the business.” (GC Exh. 11).

F. June 23 Meeting

On June 23, George Ellis, President of Terex's construction segment and DiBiagio's boss, conducted a meeting with the assembly employees that lasted approximately 30 minutes. (Tr. 1002-03, 1054).

1. The General Counsel's Evidence

The General Counsel called five employee witnesses to the assembly meeting. Their recall was sketchy at best. Steve Peterson testified that Ellis "talked about how he has control over where business is with Terex Construction, our facility, how he can move business around, how our business could fit -- or our Grand Rapids plant could fit in another facility, that kind of thing." Peterson could not recall anything else about this meeting. (Tr. 560-562).

Bill Broking testified that Ellis "didn't think it would be a good idea for a third party to represent us." He explained "how he's got the authority to move plants or shut them down." Ellis pointed at his chest and stated that he was the one who made such decisions. Ellis said something about a plant in Oklahoma, but Broking could not recall what he said on this topic or anything else about the meeting. (Tr. 596-598).

Doug Lake testified that Ellis told "a story of when he was younger working at a -- getting a job at a union facility, and being told that he was working too hard and making it poor for everybody else" and how "he had went back home to talk about [sic] his dad about it." Ellis then stated that "he wasn't going to pull any punches, that he was here to ask us not to vote for the union." Lake further recalled that Ellis "spoke of being the one

in charge of what work went where" and that "there were facilities both in Indiana and Oklahoma capable of taking care of our work load." (Tr. 618-620).

Justin Wiese testified that Ellis spoke of how he controls the work and that he "can take this work, put it elsewhere, if needed." He mentioned Oklahoma as a place where work could be moved. According to Wiese, Ellis stated that "there was other Terex companies that have closed their doors because of a union" and that he "would not negotiate with the Boilermakers." (Tr. 629-630, 641-643). [1]

Nick Baker testified that Ellis "said that he supported everything that Jim had said in the prior meeting, there would be no repercussion or anything for anything that he had said." Ellis further stated that "he controlled where all the work went and there was room in an Oklahoma facility for work." Baker also recalled that Ellis said that "there was multiple union places in the past and there were only, I believe, two left." (Tr. 993-994, 1002-04).

The General Counsel also called two witnesses to Ellis's meeting with the welding and fabrication meeting. Tony Knight testified as follows: "The only thing that sticks in my memory was he was telling us that he was the guy that could move the plant if he so wished and that he had a plant somewhere down south that could house the work that we were doing." (Tr. 925-926). Mike Kossow testified that Ellis stated that "the Union wasn't the answer for our facility," and queried "Why do we need a third party coming in here, telling us how to run our plant?" Ellis pointed at his chest and said that "he was the

[1] Wiese is the only witness to assert that Ellis stated that facilities had closed ***because*** of a union and that Ellis would not bargain with the Union. Wiese's testimony is contrary to the entire tenor of Ellis' meeting and is patently incredible.

one that determined what came in to our plant for work and what didn't." According to Kossow, Ellis pointed at a map that was displayed on an overhead projector and said, "Look at the map and see what facilities Terex had that were union. Where are they now?" Ellis stated that there was a Terex facility in Oklahoma City that was big enough to house more projects. He then stated that "Jim DiBiagio, Dallas Gravelle, Deb Schultz, and Joan Hoeschen, no matter what happened, would always have a job." According to Kossow, he tuned out at this point and stopped listening, although he did recall that Ellis said, "For any of you people that are recording this meeting, so am I." Kossow further recalled that Ellis said "that the future of our facility depends on what takes place on the 25th." (Tr. 967-970, 981-982).

2. Respondent's Evidence

In contrast to the limited recall of the General Counsel's witnesses, Respondent presented seven witnesses, including two assembly employees, who testified in far greater detail. The most complete version was offered by Ellis, who displayed a remarkable recall of the meeting:

> Well, I'd like to talk to you today, you know, about my background and why my views are the views that I have. I basically started out my career at 18 years old at General Electric and was part of UAW 647, a local union, as part of GE. And after a few weeks on the job, I was approached by my union steward, and asking me, you know, 'Why do you work so hard? Why do you put up so much effort?' And I was really confused by that growing up in southern Ohio, I always had the view that, you know -- I grew up near -- in a farming community, you work hard, you get paid, you do your job and you do the best you can. And it was really confusing to me and it was my first exposure to this kind of environment. And, you know, I went home and I talked to my dad about it -- still lived at home. And said, 'Dad, why would someone do this?' And he said,

‘Well, you know, it’s just the way it is and you’ve got to get used to that.’ And as time passed the next few months, it continued and basically told my father, I says, ‘You know, if this continues, I’m going to have to leave the company, because it’s totally against my values relative to how I think.’ So fortunately for me, 7 and ½ months later, I was given an opportunity outside of the bargaining unit and allowed me to start a career at GE, and I, hence, then went to school for 8 years at night to get my degree and really progressed through management to allow me to –

So as I progressed through my career at GE, I came into leadership positions, and as I worked in an environment that had a lack of flexibility, it became very obvious to me we were going to have some issues as we progressed as a company in this location. And at its peak, the location had 23,000 employees, and when I left, the business was down to 5,000 employees; and the majority of that change was directly related to the lack of flexibility of working as a management and a union together. And what really, really I had issue with was sitting in a room and having to lay off the best man at my wedding, or having to basically lay off the pitcher of my knothole team when I was a kid, and I basically just had had enough of that environment and wanted to go do something else. So just that shaped my views of why, you know, I believe that in this case and at this point, I’m asking you as the team members of assembly to please vote ‘no’ in 2 days when you go in to vote for the Union. And it really -- it’s unfortunate that we’re at this juncture, you know, because we’ve made a lot of progress at this location and in the business. And, you know, we’re to the point where we’re actually to a level of performance where my segment might actually be able to do a payout for a bonus scheme that we have installed to help assist the team around my entire segment. But this, you know, could hinder that from the cost of this activity.

I also, you know, want to make you aware that Terex really has three constituencies when we manage businesses. It’s like a three-legged stool, as we describe it. It’s basically we have the team members we take responsibility for, it’s our customers and it’s our shareholders. We are a for-profit company. But when we make decisions, these decisions are driven on managing to the expectations of those three constituencies. In this case, you are a part of that three-legged stool as part of the team members here. And the decisions you’re going to make are very critical, you

know, to allowing us to continue in a flexible work environment which will allow us to, you know, improve and grow the business.

A few examples I'd like to share with you in my experience with Terex is that as an example, what I mean by flexibility, I have a location in Fort Wayne, Indiana, that went through a very, very difficult time during the downturn; and we reduced the team here to around 35 -- 30 people, but I committed to the team as the business comes back because of their flexibility and because of their willingness to work with management, that I would, you know, as the business recovered, try to bring back as many folks as I could. The team understood that, we went through that horrible period, and, today, we're at 170 team members, most of them are back from when they had been laid off and the business has recovered and doing quite well and it's a tremendously flexible work force that really focuses on things that are important to us -- safety and flexibility.

Similarly, I had a situation in Oklahoma City, where I have business with eight different products and therefore are -- businesses that the product lines became a challenge for Terex. And so we decided to sell those product lines off, but because of the flexibleness -- flexibility and the willingness of the team to work with us, we found other business to move into that facility from other Terex facilities around the world as the business grew to allow us to keep team members employed and to continue to grow that facility. And that's kind of the commitment we have as a business. It's our philosophy. If you're willing to work, you know, have our core values around safety and to have our flexibility needs that we have working with us as we, you know, develop the business, we are going to work very hard to keep you employed. That's what we believe as part of that three-legged stool, that's important to us. So those are a couple examples where, you know, I personally have the responsibility of deciding where work goes and I personally make those decisions because of that work environment.

Now conversely, I can explain to you a couple of other locations that we had in Terex that the results were much different. We had a location in Cedar Rapids, Iowa, represented by a union, didn't have quite the flexibility that we have in our other facilities. And part of my decision was as we move work around, we decided to close that facility. Similarly, in Wilmington, North Carolina, we had a cranes

manufacturing facility there that was represented by a union and didn't have the flexibility that we quite were looking for, and that work now is sitting in my Oklahoma facility where we do have that flexibility.

So the reason I'm explaining this to you folks here in assembly is that I'm trying to explain you, in Grand Rapids, when I came in here in October of 2009, we were hemorrhaging money, the business was losing money hand over fist. The leadership team I changed out, went through another leadership team. And then about at the time 18 months ago, I found Jim, came in here and if it really weren't for Jim, this business would not be here, because he's come in with his skill set and brought a different level of competency relative to managing a business that's in trouble and has squeezed out a lot of the overhead costs, a lot of the practices that were here that were causing us to lose money. He's remedied a lot of that. Now the business is still challenged. It is definitely a challenged business, but I have 100 percent confidence in Jim. And no matter what way this election goes in a couple of days, Jim will still be here, because he's the man that's going to run this facility for me; so going forward, just want to make sure we all understand that.

And then as we progress into 2014, the year started off relatively good, you know, we were really robust and we were feeling confident. We had finally hit bottom and the market was going to change for us. The product development -- we've spent a fortune on developing new products to allow us to expand our distribution through the rental market versus just a dealer model that we've had in the past. We've signed up joint venture partners, Takeuchi, Vermeer, to be exact; and I'm also working on a really, really great opportunity with a company named 'Blueline' where it could be a game changer for us this year; I mean it's massively important for us. And so I really feel comfortable that things were going right. Then we hit April and May in the year, and, all of a sudden, the wheels came off again. The demand started dropping like crazy, we had a reduction in orders coming, we could see it coming. We meet every week to review these kind of situations, and then once a month to really understand. What we're going to do -- Jim, at this point, had been developing, you know, if we need to do some things differently. At this time, we really felt that we were getting back into a situation again that was going to be a challenge for us. And I said, you know, "At this point, we really need to make sure

that we stay focused on this business, and this is a distraction for us right now, and it's causing us grief. And so I really want to make sure that you understand that no matter what you've been told -- and I have been told and I have received documents -- basically comments, not documents, excuse me -- that you're being promised a lot from the Union. You are being promised a higher compensation, you're being promised a pension scheme. Well, you can go and Google and Google Terex, any location around the world; and we will not agree to a pension scheme. I have been working for 15 years to undo pension schemes in some of the toughest union environments in Europe you can ever dream of; and we are just not going to do that. We will negotiate, we'll negotiate in good faith if it comes to that situation; but we will not -- we will not provide a pension scheme, we just do not do that at Terex. And at this point, I really would like to make sure that I'd ask you to vote 'no' in 2 days, because we really need to get on with the business at hand. We have a struggling business, we are fighting for every order we can. Now I've gone out and done insane deals where I'm basically selling machines at no margin or basically under our cost to continue to keep this facility open. You know, we have lost the Blueline deal, pretty much in our view, we thought, you know, we were going to get, which would have been a game changer for us. So we're in a tough spot right now and we all need to understand that.

But I will say, you know, whatever the outcome is, we're going to be fine. Terex is a big company, the management team in here will be fine, we're not going to make any changes because of this. You know, the sun will come up tomorrow; and, if you choose to vote for the Union, we'll negotiate in good faith. But at that point, ladies and gentlemen, everything is on the table that could possibly change, because the point I'm making is we will negotiate, and I know how to negotiate. I'll make it real simple for you. A month ago, I closed 160 million sale of truck business to the Volvo Corporation where I got 15 times the EBIT earnings of that company and that was a tough negotiation. I'll be part of the negotiation, not necessarily on the day-to-day part of it, but when it comes the time to decide, I'll make the decision. So, you know, we're definitely here, willing, if it comes to that. But the key thing, and I want to make real sure everybody understand this, if you vote for the Union, we will not close this facility the next day or any time in the near future, so don't get confused by that, we'll

> continue to be O.K. and we'll move forward. But I ask you one more time, please vote 'no' in 2 days for the Union.

(Tr. 1055-1063).

Ellis' testimony was substantially corroborated not only by multiple Terex officials, but by two unit employees. (Tr. 1122-27, 1140-46, 1518-20, 1529-30, 1631-34, 1820-22). Further, the General Counsel recalled most of the employees who testified regarding the Ellis meeting on rebuttal. These employees testified that they did not recall or remember any reference to the plant remaining open, but did not outright deny that such a statement was made. Further, they did not rebut any other part of Ellis' testimony. (Tr. 2008-12).

G. Individual Conversations

1. Nancy Dahlgren

a. General Counsel's Evidence

Bill Broking testified that Nancy Dahlgren brings TCA orders for wheels to him on a regular basis. On the day before the assembly election, Dahlgren asked him what he thought about the union. Broking responded that he wasn't really sure how he felt as he had never worked under a union. According to Broking, Dahlgren stated, "If they get a union in here, you know, this place will close or move." Broking just shrugged his shoulders and continued working. (Tr. 601).

Mike Kossow testified that he was working in close proximity to Broking and that he overheard this conversation. According to Kossow, Dahlgren asked if she could have a word with Broking, to which Broking responded affirmatively. Dahlgren then related her

history with another company that had been unionized, how the plant had closed, and how she liked her current job. Dahlgren then stated that if the Union came in to the Grand Rapids facility, the same thing would happen, and she was too old to start over. According to Kossow, Broking nodded his head and said, "Yeah, I'd sure hate to see that too." (Tr. 974).

Justin Wiese testified that on the day prior to the election he observed Dahlgren talking to Miranda Clark, Greg Payne and Doris Olson. Wiese was 10 feet away and could hear the conversation. According to Wiese, Dahlgren said that she did not want to start over in her career, and "if you guys do vote the union in, they will close the place down and I don't want to have that go on." Wiese testified that the conversation lasted about 15 minutes. (Tr. 631-632).

On cross-examination, however, Wiese acknowledged that he gave an affidavit to the Board on July 10, and that the affidavit indicated that Greg Erickson—not Doris Olson—was the third employee present. Wiese, however, insisted that it was Olson, not Erickson, who was present. (Tr. 637-640).

Doug Lake testified that Dahlgren approached him and asked what Lake thought of the meeting, to which Lake responded, "I have never been and never will be affected or influenced by fear." Dahlgren stated, "I'm 52 years old and I really don't want to have to start over. I worked other union positions -- or union "places" is the term that she used -- "and when they came in, we had to move on." Lake responded that he had made up his my mind and nothing she said would change that. Dahlgren then said, "Well, I guess I'll move back to the Cities then." (Tr. 617-618).

Nick Baker testified that he too had a conversation with Dahlgren prior to the election. According to Baker, Dahlgren told Baker that he should vote no for the Union because some plant she had previously worked at "had got a union in there and it messed everything up and they closed down." Dahlgren also asked Baker why he was interested in the Union. Baker related some general frustrations of his. The conversation lasted around 5 minutes. (Tr. 995).

b. Respondent's Evidence

Nancy Dahlgren testified that she did have conversations with some employees regarding the union issue in the days prior to the election. One of these employees was Bill Broking. Dahlgren testified that she approached Broking with the orders that she brings to him on a daily basis and that Broking commented "Look at those guys over there, all they're doing is talking. I wish they'd get to work with all the work I have to do." Broking referenced the union, and Dahlgren replied, " just so you know, the union can't promise you everything." Dahlgren went on to talk about her prior work experience at a union plant that had closed. She told Broking, "Where I worked before, they closed the doors and it was a union plant, so they may think it's good, but it doesn't mean it's for sure thing, I mean that they can't move the plant or move the parts other places." Dahlgren related to Broking that she was 52 years old, that Terex was a good place to work, that she had no college degree, and that she did not want to start over. Dahlgren denied saying that the plant would move or close if the Union came in, but admitted that she said she was worried that it would. (Tr. 1225-27).

Dahlgren testified that she had a similar conversation with Nick Baker, Doug Lake, Miranda Clark, and Greg Payne. Regarding her conversation with Baker, Dahlgren testified: "I more or less said the same thing that I was worried about the plant closing, and that a contract doesn't mean every -- anything. I mean, it's the company that makes the decision on what goes on with the company, so -- and I said I was worried about the plant moving." Dahlgren testified that she explained to Baker: "I was in a union, and I thought I'd retire from there, I said, but they moved the plant, they've moved all our jobs to other plants." (Tr. 1227-28). Regarding her conversation with Lake, Dahlgren testified that she spoke to Lake after one of the meetings with Ellis or DiBiagio. Dahlgren told Lake that she thought it was a good meeting with a lot of good information. Lake made a comment regarding fear. Dahlgren then asked him if he had ever been in a union, and Lake replied affirmatively. Dahlgren expressed that she was worried about her job, and she explained what had happened to her at a prior employer. Lake again said that they were not going to put fear in him. Dahlgren then said, "Well there's no jobs around here for me, unless I go to a mine," that she "might move -- if it did move," and that "I'd move back to the cities, I guess." (Tr. 1228-29). Regarding Clark and Payne, Dahlgren testified that she clearly remembered saying that she had no idea whether they were for or against the union, but "For my sake and others, I hope you vote 'no'." Dahlgren was uncertain whether she told them about her past history, but she testified that she generally did relay this story. (Tr. 1229).

2. Buck Storlie

a. General Counsel's Evidence

Bill Broking testified that he was approached by Buck Storlie on the day before the election, and that Storlie asked him what he thought about the Union. Broking replied, "I'm not sure, I've never worked for one." Storlie then stated that he "didn't think it would be a good idea, and that he feared that the plant would move or -- if the union come in." (Tr. 600).

Mike Kossow testified that he overheard this conversation between Broking and Storlie. According to Kossow, Storlie said it was none of his business and no one had told him to come down on the floor, but he "was curious on his own accord." Storlie then stated that he did not believe that the Union was the answer; that if the Union came in, they would probably shut the plant down; that it was the only job he had known, and that it would be detrimental to the community because of the job loss. Broking nodded his head and said, "Yeah, I agree with you, Buck. I'd hate to see that too." Storlie shook Broking's hand and then departed. (Tr. 976-977).

Justin Wiese testified that on the day prior to the election, he overheard Storlie talking to employees Miranda Clark, Greg Payne and Doris Olson. According to Wiese, Storlie told the employees to vote "no" and that the plant would close if the Union came in. As with Dahlgren, however, Wiese's affidavit reflected that Greg Erickson was there instead of Olson. (Tr. 632-634).

Brandon Rajala testified to two conversations with Storlie. The first occurred two or three weeks before the election in the garage door opening at the off-site test track.

Mike Willson was also present. According to Wiese, he and Willson asked Buck, "What's the plant like for the Union? What's the morale around the place?" Storlie replied, "Terex isn't fucking screwing around. They will move the plant." (Tr. 872). Willson's version of the conversation was different. According to Willson, Storlie stated his opinion against the Union, that Terex had the power to close or move the plant, and that the Union would probably hurt the employees more than it would benefit them. (Tr. 891). On cross-examination, however, Willson acknowledged that he gave an affidavit to the Board on August 17 and that in this affidavit made no mention of Storlie saying anything about the plant moving or closing. Further, in this affidavit, Willson stated: "I have not personally heard Storlie say that the Union would hurt the plant, but he has made comments about how the Union would be a headache with the negotiations. He has commented that he didn't think it would be an easy thing to transition to a union facility." (Tr. 894).

Rajala testified that his second conversation with Storlie occurred over the telephone after the election. Storlie was "coaching" Rajala in how to complete an on-line application for an open technician position at the test track. During this process, the computer program requested that the applicant identify the plant and location at which the applicant was applying. While doing so, Rajala observed, "Wow. Terex has got a lot of plants all over the United States," to which Storlie said, "Yeah. Terex is not screwing around. We will move the plant." He did not specifically mention the word "union." (Tr. 866-867, 875).

b. Respondent's Evidence

Buck Storlie testified that approximately two weeks before the election, Brandon Rajala and Mike Willson were chatting near the garage door to the test track when they turned to him and said, "Buck, what do you think of all this union stuff?" Storlie replied: "In my opinion, I think it's a bad idea. I don't believe a union can be helpful to us as a group. That I had, you know, past experience with union elections, that at one time in my prior employment was a voting member, and that I was part of the voting team, and I was non-union then and I remained -- I remain a non-union person today. That I believe that, you know, the addition of the union is just -– for us, would just be additional hassle, additional cost, and negative impact, and that as a business, we need to be competitive. That we have competition amongst ourselves as well as our competitors, and that I didn't believe a union could help us be more competitive or become a better company." Storlie testified that "There was discussion around the fact that we need to focus on value add. And if we're profitable, we're going to be here a long time to be successful; and, if we're not profitable, that we won't be successful." He denied saying, "Terex isn't fucking around; they will move this plant," or anything similar. (Tr. 1171-73).

Storlie also testified that there was a vacancy for one of the test track facilities and that he advised both Rajala and Willson about the vacancy if they wanted to apply. Subsequently, Rajala called Storlie, who was at the main facility, seeking help with the application. Storlie got on his computer and assisted Rajala through the on-line process. Storlie acknowledged that there was a dropdown list of all Terex facilities and that he

helped Rajala identify the correct one, but denied that he said anything about the plant moving or closing as "it was not a union conversation" and the conversation was about "the position he wanted to apply for" and wholly unrelated to what was going on at the plant. (Tr. 1168-71).

Storlie further testified that he had a conversation with Bill Broking a day or two prior to the election near the wheel sub-assembly area. Mike Kossow was 15 to 20 feet away. Storlie related his conversation with Broking as follows:

> "Hi Bill, you know, I just wanted to swing by and chat with you a bit. I'm here under my own accord, and under, you know, my own opinions. I don't, you know -- tomorrow" or it might have been the next day, "we've got a union election coming up. I, as an employee here, don't get to vote, but certainly get to be affected by the decisions made by the rest of the group. So I don't want to know what your position is on the union, I don't care what your position is, I just want to go ahead and share mine." And he said "Yeah, go ahead." So I said, you know, that "I'm not a union supporter. I have been an employee here a long time. I was on the your side of the fence where I was a voting team member and had to make a decision. I was not a union supporter then, and I remain not a union supporter today. I don't believe that unions can help us accomplish what we're trying to accomplish. I think they will make us less competitive in this industry. I think that they will ultimately cost us a lot of money in lawyers and legal fees, and every other thing that comes with that, and that we -- you know, that it's in our best interest to be non-union and to remain competitive, and that's what will help us succeed, not you know, fighting with a union."

(Tr. 1179-80). Storlie denied asking Broking how he felt about the union and denied saying that the plant might close or move.

Storlie further testified that he had much the same conversation with Miranda Clark and Greg Payne. Storlie did not know Justin Wiese and was uncertain if he was in the area at the time. Storlie testified that Clark and Payne were working on a hydraulic

tank and were standing facing each other. Storlie approached "and said, exactly the same thing I just repeated to you [regarding the conversation with Broking], that, you know, I was there on my own accord, and that I wasn't going to get to vote, but I wanted to go ahead and share my opinion. That I didn't want to know their position, but please let me share mine. And again, it was, 'Go ahead.' So I very much stated the same position that I was not a union supporter then, that I'm not one now, and that I feel that it will be a negative impact to our business and a costly venture." Storlie denied saying that the plant would (or might) close or move if the Union came in. (Tr. 1180-81).

3. Bill Wake

a. General Counsel's Evidence

Bill Broking testified that he was also approached by Bill Wake on the day prior to the election, asking what Broking thought about the Union. Broking responded that he wasn't really sure as he had never really worked under a union before. Despite being asked directly by Counsel for General Counsel if Wake said anything about the plant moving or closing, Broking declined to say so, stating, "I don't know if he did. I can't remember, I guess." (Tr. 599).

Mike Kossow testified that he witnessed this exchange between Wake and Broking: "I saw Bill Wake talking to Bill Broking and I witnessed him telling Broking that if the Union came in they would shut the doors in the plant. And that's all I heard. Period." Kossow was 5 to 6 feet away at the time. (Tr. 973).

b. Respondent's Evidence

Bill Wake testified that he had a conversation with Broking, but denied that Mike Kossow was present or in the area when the conversation began. According to Wake, he typically greets Broking whenever he is walking by and that he did so on this day, asking Broking, "how's it going?" Broking responded, "Great, it will be better when all this union stuff is over." Broking indicated that he just wanted to do his job. Wake told Broking that he personally didn't believe the union was the best choice for the workers, that the jobs were good jobs and that he did not see how the Union would benefit the employees. At this point, Wake observed Kossow walking up. Because he considered the conversation to be private, he ended the conversation and walked away. Wake denied saying anything regarding the plant closing or moving. (Tr. 1208-10).

4. Lori Gill

a. General Counsel's Evidence

Bill Broking testified that Gill asked him what he thought about the Union and that he responded as he had with Dahlgren, Storlie, and Wake. When asked by Counsel for General Counsel, "did she mention anything specifically about the plant closing that you remember, anything like that," Broking responded, "I don't think she did, no." (Tr. 601-602).

Mike Kossow, however, asserted that he overheard this conversation: "It was the same as Bill Wake. I just came in the conversation, and she told -- what I -- well, what I heard her tell was that, same thing, plant had the Union, they would close the plant."

Although Kossow testified that “he was almost on Gill’s heels,” he claimed “And that's all I heard, there again.” (Tr. 975-976).

b. Respondent’s Evidence

Lori Gill testified that she sees Bill Broking regularly as she walks through the facility. Gill denied, however, having any conversation with Broking about the union or saying to him or anyone else that the plant would close if the Union came in. (Tr. 1404-05).

5. Joan Hoeschen

a. General Counsel’s Evidence

Kerry Esler testified that a week or two after the election, he went up to Joan Hoeschen’s office “just to clear the air” as to why he voted for the Union. Esler told Hoeschen that he voted for the Union because he “was sticking up for my guys and they had enough votes for it to come in anyway and I decided that we had to stick together, so we all voted the way we voted.” To this, Hoeschen allegedly responded, "We'll see how that works out for you." Someone else then came in the door, and Esler left, but as he was leaving, Hoeschen said, "Good luck with that." (Tr. 693-694).[2]

Lee Kostal testified that on the day of the paint election, following the union victory, he approached Hoeschen and told her that he was kind of mad because DiBiagio had told the employees, "Win or lose,” he would come out and inform employees of the vote results. Because that had not happened. Kostal asked Hoeschen , "Where's Jim?

[2] Esler testified to a few other conversations with Hoeschen, but these are not alleged in the complaint.

Why hasn't he said anything to the employees?" Hoeschen responded that she was not aware of what had been said, and when Kostal explained, she said, "I'm out of the loop." Kostal then stated, "Well, it ain't up to me, as an employee, to address the other employees," and "This is your department. You should know what's going on." Hoeschen then asked Kostal if he was wearing his ear plugs. Kostal replied affirmatively. Hoeschen then asked Kostal to turn his head. After he did, she asked him to show her the other side. Kostal stated to Hoeschen that he was not stupid and that he knew the earplugs were for his benefit. Hoeschen replied, "Well, I didn't say you were stupid," and walked away. Shortly thereafter, Kostal was talking to Jesse Schminski about his conversation with Hoeschen, when Hoeschen appeared again, and said, "It sounded to me like you said 'shit.'" Kostal denied this, and Hoeschen stated, "I could swear it sounded to me like you said 'shit.'" Kostal replied that Schminski was just asking about the earplugs. (Tr. 838-839).

b. Respondent's Evidence

Joan Hoeschen acknowledged having a conversation with Kerry Esler in which he explained why he had voted for the Union. Regarding this conversation, Hoeschen testified:

> On the day of the first layoff, which was June 26th, he came into my office and he -- it was in the morning -- and he said, "It must have been a tough morning for you." And I said, "It was a terrible morning for me." And he said, "I could see that, by the people you let go, it was based on skills." And I said, "Yes, it was." And then he said, "You know, the only reason I voted for the Union was to support my team." And I remember that it was like several seconds of silence, because I wasn't even going to engage in that. And a weld/fab team member came up to my door, and I signaled for

> them to come in, and I said -- I just said to Kerry, "We will figure this out, it will all work out." And he left my office.

(Tr. 1728).

Hoeschen also acknowledged having a conversation with Lee Kostal following the paint election. Hoeschen testified that as she was walking through the paint department, Kostal stopped her and said he was upset that no one came out and informed the employees of the results of the election. Kostal expressed that DiBiagio had promised to do that. Hoeschen replied That she “was not in the loop” and had been sequestered in her office while the election was taking place. As they were talking, Hoeschen noticed that Kostal’s hearing protection was not visible, and she asked him if he was wearing hearing protection. Kostal turned his head and showed her that he was wearing protection. Hoeschen said, "Great," and left the department. A little later she was walking back through the department when she thought she heard Kostal say "shit." This was “not really that big of a deal,” but because she is responsible for the employees, “whenever I hear something like that I investigate.” Kostal was not prone to such language, and Hoeschen was surprised and wanted to make sure nothing was wrong. So, she asked Kostal if he had made such a statement, and when he responded “no,” she said, "So everything is okay?" Kostal replied "yes," and Hoeschen departed. No discipline was issued. (Tr. 1729-30).

H. June 24 Meeting

On June 24,[3] DiBiagio conducted a final meeting with the assembly employees. [GC Exh. 12]. There are no allegations that DiBiagio made any unlawful statements in this meeting. Using power points displayed on a screen, he talked about how employees were not obligated to vote for the Union even if they had signed a card or told a co-worker they would vote for the Union, how collective bargaining was a risky process and there were no guarantees, how job security came by "providing a quality product at a fair price" and having the "flexibility to satisfy our customers," how the painters were taking a "big gamble," and how the assemblers could sit back and see "if the painters get everything the union has promised" and if they did, the assemblers could vote the union in a year later.

I. The Election Results

The election was conducted on June 25, and the ballots were opened on July 3. The results were 22 votes against the Union, 15 votes in favor of the Union, and 2 votes challenged by the Union which were non-determinative and thus were not opened. (GC Exh. 4(f)).

ALLEGATIONS

A. Jim DiBiagio

Paragraphs 7(a) through 7(f) of the consolidated complaint allege that DiBiagio made numerous unlawful threats in his June 19 meetings, including threats of plant

[3] The presentation is erroneously dated June 25.

closing, unspecified reprisals, and adverse economic consequences as a result of the employees' union activities.

B. George Ellis

Paragraphs 7(i) through 7(q) of the consolidated complaint allege that Ellis made numerous unlawful threats in his June 23 meetings with employees.

C. Nancy Dahlgren

Paragraph 7(g) of the consolidated complaint alleges that following DiBiagio's June 19 meeting, Dahlgren interrogated an employee regarding the employee's reaction to the meeting. Paragraph 7(h) of the consolidated complaint alleges that during this same conversation, Dahlgren threatened that the plant would close if employees voted for the Union.

Paragraph 7(r) of the consolidated complaint alleges that on June 23 and 24, Dahlgren repeatedly threatened employees that the plant would close and Dahlgren would be left with nothing if employees selected the Union.

D. Buck Storlie

Paragraph 7(s) of the consolidated complaint alleges that on June 24, Storlie "repeatedly threatened employees individually and in separate conversations that the plant would close if the employees voted for the Union."

E. Bill Wake

Paragraph 7(t) of the consolidated complaint alleges that on June 24 Wake "repeatedly threatened employees individually and in separate conversations that the plant would close if the employees voted for the Union."

F. Lori Gill

Paragraph 7(v) of the consolidated complaint alleges that on June 24, Lori Gill "repeatedly threatened employees individually and in separate conversations that the plant would close if the employees voted for the Union."

G. Joan Hoeschen

Paragraph 7(v) of the consolidated complaint alleges that between June 19 and 24, Hoeschen "threatened an employee with unspecified retaliation because the employee voted for the Union."

ARGUMENT

A. Jim DiBiagio Did Not Unlawfully Threaten Employees.

Regarding DiBiagio's remarks of June 19, one might reasonably view them as provocative and hostile, but hostility toward a union is not an unfair labor practice. *NLRB v. Arkansas Grain Corp.*, 392 F.2d 161, 165 (8th Cir. 1968). The First Amendment to the Constitution, as well as § 8(c) "permit the company to harbor and express animus (hostility) toward the union," *Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 721 (7th Cir. 1987), so long as there is "no threat of reprisal or force or promise of benefit." In context, DiBiagio's remark were not threats; they were statements of the economic difficulties that the plant faced and the struggles to make the plant profitable.

The allegations of the consolidated complaint that DiBiagio threatened that the facility "could or would be closed because of employee support for the union" is unsupported. Nowhere in the presentation does any statement to this effect appear. It is true that DiBiagio stated that "Terex had multiple unionized factories, most of them are

gone." He also stated that he had to close 4 union plants in his career. But he also immediately stated that "Unionized facilities simply struggle to remain competitive." Nowhere does he state or imply that the mere fact of unionization resulted in these plants closing.

DiBiagio also discussed the ongoing struggles of the Grand Rapids facility to become profitable, the fact that the plant had "been on the block more than once," and that he "had to fight for your existence each and every day to keep the wolves at bay and just when we build a little breathing room here we go pulling a dumbass move like bringing in a union." Again, however, he did not suggest that this "dumbass move" would or could cause the plant to close. Rather, he talked about the declining business and the rough economic times that were ahead.

The contention that DiBiagio threatened plant closing is also undermined by his statements concerning bargaining and whether the union could actually produce on its promises. These statements suggest that the plant will continue to operate. Although DiBiagio stated that if a strike disrupted the business or caused the plant to lose more orders, he did not think that the plant could survive, he did not predict a strike, and his comments were clearly tied to economics.

The complaint also alleges that DiBiagio made threats of unspecified reprisals and adverse economic consequences because of the "union crap," stated that if he couldn't trust someone they were nothing to him, and that bringing the union in had caused unspecified damage. DiBiagio, however, never asserted that Respondent would take adverse action because of the union or for reasons other than bona fide economic

conditions. DiBiagio remarks about trust were immediately followed with an explanation of what he had done to earn the employees' trust and a rhetorical question of what the Union had done to earn the employees' trust. And his comment about damage was directly related to the "mud slinging arm twisting bullshit" that he had told employees would occur in a union campaign.

DiBiagio's remarks were stern, but they are best understood as a wakeup call to those employees who opposed the Union but were sitting idly by and not speaking up. Thus, at the end of his presentation, DiBiagio stated: "You need to hear this because if I were you who are against the union I would start speaking up NOW and those of you who think bringing in a union is a good idea need a reality check."

In summary, DiBiagio may have offended the sensibilities of some, but his remarks were protected by section 8(c) of the Act and did not violate section 8(a)(1).

B. George Ellis Did Not Unlawfully Threaten Employees

Unlike DiBiagio's speech, Ellis's presentation contained no harshness at all. Rather, he laid out his own personal story and his reasons for why he believed a union was not in the best interest of employees. It is true that he stated that he was the one who decided where work was placed and that he had the power to move work, but these were true statements and did not in and of themselves constitute threats. Ellis linked his discussion of other union plants that had failed to their lack of flexibility, and he stated that Respondent looked at a plant's flexibility and willingness to work as a team in deciding where to move work. Again, there is nothing unlawful about such statements. At no point did Ellis predict that the Union would cause the plant to close or work to be

moved. To the contrary, as testified to by unbiased employees as well as management representatives, he stated that regardless of the outcome of the election, the sun would come up the following day and the plant would continue to operate. Notably, although the General Counsel recalled many of its employee witnesses on rebuttal, not one affirmatively stated that Ellis did not make such a remark. Rather, they simply testified that they did not recall any such statement.

The allegation that Ellis threatened not to bargain with the Union is supported only by the testimony of Justin Wiese. No other employee testified to any such statement. Wiese's testimony is simply not credible. Indeed, Ellis went into a story about how he was a tough negotiator and the Union would have to deal with him. It was clear that Respondent would bargain with the Union if necessary.

Ellis's comments were protected by section 8(c) and did not violate the Act.

C. Nancy Dahlgren Did Not Unlawfully Interrogate And Threaten Employees

There is no dispute that Dahlgren spoke to a number of employees shortly before the election and that she related a personal story in which she had worked for a union plant for a number of years and that the plant had closed and she had lost her job. Dahlgren expressed her fears that this could happen at the Grand Rapids facility and that she was too old to start over. Dahlgren was a low-level supervisor who appeared to be a timid person. Her statements did not purport to represent the position of the Respondent and were in the nature of personal fears. In context, they were not coercive. Respondent requests that these allegations be dismissed.

D. Buck Storlie Did Not Unlawfully Threaten Employees

The allegations regarding Storlie relate solely to pre-election conversations with employees. There is a separate post-election conversation that is not alleged as a violation, but apparently was offered as evidence of animus toward Brandon Rajala.

The allegation that Storlie threatened Rajala and Mike Willson with plant closing is not supported by the credible evidence. First, Rajala's testimony that Storlie said, "Terex isn't fucking screwing around; They will move the plant" simply does not have the ring of truth. This alleged statement appeared to be inconsistent with Storlie's demeanor on the stand and Rajala's testimony lacks any context that would make this alleged statement believable. Further, Willson acknowledged that in his pretrial affidavit, he stated "I have not personally heard Storlie say that the Union would hurt the plant, but he has made comments about how the Union would be a headache with the negotiations. He has commented that he didn't think it would be an easy thing to transition to a union facility." The General Counsel's evidence is not credible. In contrast, Storlie's testimony provided credible details. Storlie did not threaten Rajala and Willson.

Similarly, the General Counsel's evidence that Storlie threatened Broking and a group of employees including Miranda Clark and Greg Payne is not credible. These allegations are based on the testimony of Broking, Mike Kossow, and Justin Wiese. As discussed above, Wiese was not a credible witness and was not even a party to the conversation. Broking and Kossow testified about conversations with several managers and their testimony appeared to be a compilation of their interpretation of these conversations rather than a recitation of what was actually said. Further, although Storlie

acknowledged that Kossow was in the vicinity at the time, Kossow's claim that he was present at multiple other similar conversations does not ring true. Respondent contends that Storlie should be credited and that these allegations should be dismissed.

E. Bill Wake Did Not Unlawfully Threaten Employees

The witnesses concerning Bill Wake were once again Broking and Kossow. Broking himself testified that he did not know whether Wake stated that the plant would close and he did not testify to anything Wake specifically said. Kossow's testimony seemed as if it was canned: "I saw Bill Wake talking to Bill Broking and I witnessed him telling Broking that if the Union came in they would shut the doors in the plant. And that's all I heard. Period." Wake denied that Kossow was even present during the conversation and testified that he terminated the conversation as soon as Kossow walked up. Wake's testimony was credible, and Respondent requests that this allegation be dismissed.

F. Lori Gill Did Not Unlawfully Threaten Employees

As was the case regarding Wake, Kossow and Broking contradicted each other regarding Lori Gill. Broking specifically denied that Gill said the plant would close. Kossow's testimony to the contrary was almost identical to his testimony regarding Wake: "It was the same as Bill Wake. I just came in the conversation, and she told -- what I -- well, what I heard her tell was that, same thing, plant had the Union, they would close the plant." Although Kossow testified that "he was almost on Gill's heels," he claimed "And that's all I heard, there again." Gill denied making any such statement and

denied that Kossow was even present. This allegation is not supported by credible evidence, and Respondent requests that it be dismissed.

G. Joan Hoeschen Did Not Unlawfully Threaten Employees

The sole allegation concerning Joan Hoeschen is that she threatened an employee with unspecified reprisals between June 19 and 24. Respondent believes that this is a reference to a conversation between Hoeschen and Kerry Esler on June 26. However, it might possibly refer to a conversation Hoeschen had with Lee Kostal on June 18. In any event, neither allegation has merit.

There were only slight differences between the testimony of Esler and Hoeschen. Both agreed that Esler sought to explain why he voted for the Union and that the conversation was interrupted when someone else walked into the office. Whereas Esler testified that Hoeschen said, "We'll see how that works out for you," Hoeschen testified that she said “it will all work out.” Esler testified that Hoeschen said, "Good luck with that." Hoeschen denied making this statement.

Respondent contends that Hoeschen should be credited, but that even if Esler’s version is credited, it is simply too ambiguous to establish a violation. By all appearances, this was an awkward conversation for both Esler and Hoeschen, and each appeared to be trying to testify truthfully. Given the circumstances, it is quite likely that Esler perceived Hoeschen’s remark as signaling some type of negative consequences, whereas Hoeschen was simply trying to end a conversation she was reluctant to have. Respondent requests that this allegation be dismissed.

As for the conversation with Kostal, Hoeschen was merely trying to ascertain first whether Kostal was wearing hearing protection and second whether he was upset. No one contends that saying “shit” (even if he had said it) would violate any rule, but Kostal was a mild mannered person who was not prone to using such language and Hoeschen thought he might be upset. When it became apparent that she had misunderstood him, the matter ended. There was never any suggestion of discipline. If this is the allegation, Respondent requests that it be dismissed.

SECTION 8(A)(3) OUTSOURCING AND LAYOFF ISSUES

STATEMENT OF FACTS

A. The Respondent's Business

Respondent acquired the Grand Rapids facility in 2008, where it assembles compact track loaders (CTLs) and skid steer loaders (SSLs) for the construction industry. The primary difference between the two machines is that the CTL operates on a track system, whereas the SSL is a wheeled machine. Respondent produces various models of each machine. The SSLs are classified as either vertical or radial, depending upon the type of mechanism that lifts the bucket, and come in three platforms: mid-frame (50 and 60 horsepower), large frame (70, 75, 80 HP), and an even larger 90 horsepower machine (vertical lift only). All CTLs are radial machines, and there are four platforms: small (30 horsepower), mid-frame (50 and 60 HP), large frame (70, 75, and 80 HP), and a larger 100-horsepower platform that is being phased out, to be replaced by the 110- horsepower platform. While there are a number of similarities in the various models (both CTL and SSL),a 110-HP machine requires roughly twice the amount of labor that is required to build a 30-HP model. (Tr. 1549-53).

The three largest components of either a CTL or a SSL are the cab, the chassis, and the loader. Numerous other smaller parts are also used in the assembly process. Historically, the large components for the CTLs (all chassis and loaders and most cabs) came to the facility already fabricated as finished, albeit unpainted, weldments. The large components for the SSLs, however, were historically fabricated and welded at the Grand

Rapids facility.[4] These components, whether fabricated in-house or purchased from a vendor, were delivered to the paint department, where they proceeded through the large paint booth and were then delivered to the assembly area. There are two primary assembly lines, one for CTLs and one for SSLs, and numerous sub-assembly stations. (Tr. 1544-47).

B. 2008-2012

Financially, the Grand Rapids facility performed poorly between 2008 and 2012, and this was true both when sales were high and when sales were low. In 2008, Respondent sold 1,556 machines, but had an operating loss of just under $16 million. In 2009, it sold only 588 machines and lost just over $21 million. In 2010, it sold 1,158 machines and lost just over $5 million. In 2011, it sold 2,089 machines, but lost just under $18 million. In 2012, it sold 1,613 machines, but lost slightly more than $8 million. (GC Exh. 6, pp. 7 and 9). During this five-year period, the facility had a number of different general managers, none of whom succeeded in turning the facility profitable.

C. Jim DiBiagio Hired As General Manager

In February 2013, Jim DiBiagio was hired as the new General Manager, reporting to George Ellis, who was responsible for Terex's construction segment. At the time of his hire, DiBiagio learned from Ellis that the combined operating losses in 2010, 2011, and 2012 were in excess of $30 million, that the plant was having difficulty in meeting delivery schedules, and that there were various quality issues. Ellis' directive to DiBiagio

[4] DiBiagio outsourced the SSL cabs to Inova in 2013 to relieve some of the pressure on weld/fab to meet production schedules. (Tr. 1546).

was to make the facility economically viable to the stakeholders, to catch up on backlog, and to address the quality issues. To this end, DiBiagio began assessing the employees to see where training was needed and assessing the overall production process to determine why the process functioned so inefficiently. Overtime was being worked virtually every Friday to the point where overtime represented 25% of the payroll. DiBiagio attempted to isolate the root causes. He determined the management team was overstaffed and that some managers were not performing satisfactorily. Thus, he revamped the organizational structure, eliminated certain positions, terminated the nonperforming managers, and reallocated their responsibilities. DiBiagio created essentially one layer of managers reporting directly to him. Joan Hoeschen, who was the purchasing manager, assumed the manager role for welding, fabrication, and paint. Dallas Gravelle was the manager of assembly. (Tr. 1540-44).

D. The Zinc Issue And The Decision To Outsource

Upon his arrival at the facility DiBiagio was also made aware of an ongoing zinc discharge issue related to the wash bay part of the paint line. The facility discharges into the Grand Rapids town sewer system, and Respondent monitors the water going out. For a few years, the facility had been exceeding the permissible levels of zinc. The facility had retained a third-party consultant, Liesch, to assist with identifying the root cause and remediating the issue. (tr. 1554-55). According to Liesch representative Travis Knisley—who was called as a witness for the General Counsel—"the different metals that come into the wash booths are washed with acids and different cleaners and things to remove oils, greases and things prior to painting, and the zinc was coming from the waste

water dealing with those wash booths. They utilize a phosphatizing process is why they are regulated categorical pretreatment standards." (Tr. 204-205).

When DiBiagio arrived, Production Manager Todd Witherill and Health and Safety Specialist Justin Fischer were working on the issue with Liesch and the Minnesota Pollution Control Agency (MPCA). DiBiagio initially abstained from becoming deeply involved in the issue, choosing instead to focus on other issues. However, in the summer Witherill left the company, and DiBiagio began to become more involved in the zinc issue. At the time, Liesch was recommending that Respondent build a waste water treatment system facility. (Tr. 1554-56). DiBiagio had prior experience with such facilities, and he requested that Liesch lay out the system it was proposing. DiBiagio testified that the proposed system was "not overly complicated, but it is a system that included filter presses, which are very dirty, and it also included sulfuric acids as part of the treatment process, along with some polymers, to treat the material and the water." (Tr. 1556). DiBiagio knew that such systems "generate a hazardous waste as a by-product of those systems, which you have to collect and dispose of accordingly." (Tr. 1556). This caused DiBiagio concern because adding this process and the associated chemicals would cause Respondent to become a hazardous waste generator, would be very expensive, and would alter the nature of the facility, which was essentially an assembly operation. Further, DiBiagio preferred to address the root causes rather than simply treat the symptoms. (Tr. 1556-1557). DiBiagio expressed these concerns to Liesch. (Tr. 211-212).

Because Liesch and Fischer were having difficulty identifying and correcting the root cause, DiBiagio decided to proceed down parallel paths. Thus, he directed Liesch to

continue developing a waste water treatment system, but at the same time he decided to investigate eliminating (or substantially reducing) the wash process through outsourcing, thereby eliminating the zinc discharge. To that end, in or around September 2013, DiBiagio directed Paint Manager Hoeschen and Purchasing Manager Travis Anttila to start soliciting quotes. Quotes for the CTL chassis were obtained from Weisgram, and in October, Weisgram began supplying powder coated chassis for the PT-80 model on a trial run basis. Following quality assessments, which were successful, Weisgram began supplying all PT-80 chassis powder coated in January 2014. (Tr. 1557-62, 1705-06).

Simultaneously, as Liesch was evolving its design of the waste water treatment facility, two things became apparent to DiBiagio. First, the system was going to be a much larger system than originally described. Second, because of the larger size, it was going to be necessary to build an annex to the facility to house the system. DiBiagio remained averse to the idea of building such a facility, but because the building season for northern Minnesota had passed, there was no immediate need to make any final decisions until spring approached. Thus, as 2014 rolled around, there was a period of inactivity with regard to building the waste water treatment facility.[5] Instead, Respondent continued examining the viability of outsourcing as a solution. (Tr. 1561-62). In January, Respondent monitored and inspected the PT-80 chassis being received from Weisgram. By late February, DiBiagio was satisfied that outsourcing had "proven itself to be a viable option in terms of remediating our zinc issue, and that we could go ahead and just

[5] According to Liesch representative Knisley, he was unaware of anything that Respondent did to actually make a waste water treatment facility a reality. (Tr. 210, 213).

get them powder coated at the same facilities where they were being fabricated, bring them in already powder coated," thereby bypassing the wash bay. (Tr. 1562). DiBiagio testified, "Once we got into February, and particularly mid-February, we had received several shipments of the PT80s, powder coated. They had already made it into assembly and we made machines out of those chassis without any problems. I had made the decision, whether it'd be formally or informally, I had made the decision that that is a viable way to go, that is an option that we probably should pursue." (Tr. 1587).

In March, DiBiagio directed the purchasing team to go out and solicit quotes for chassis, loaders, and cabs. Because these components for the CTLs were already being fabricated by outside vendors, all that was necessary was to have them quote the components powder coated. "The skid steers took a little bit more, because we had to also consider do we fabricate inside, then send the product out to get it coated, and then bring it back in once it is painted, or have our current fabricators fabricate those components as well, which we were currently making in-house. So, for those models, we were also soliciting quotes for the full fabrication of those components." (Tr. 1587-88).

In late March, the outsourcing efforts took on greater urgency. On March 26 DiBiagio sent an email to purchasing manager Anttila requesting that he "update us at staff mtg Monday on (1) progress in getting skid steer chassis & loaders outsourced to Weisgram and (2) having all chassis (black) and loaders (white) supplied powder coated and then grey on grey starting July. (Resp. Exh. 59). This triggered a flurry of activity in late March and early April by the purchasing department in seeking quotes from vendors. (Resp. Exh. 59; 60).

On March 31 Liesch representative Knisley sent Justin Fischer an email, along with a compliance schedule from MPCA. This was the first compliance schedule received from MPCA and it established significant completion dates. (Tr. 216-217). The compliance schedule included the wastewater treatment facility. In his email, Knisley noted that they needed to respond to MPCA by April 9 at the latest. He further noted:

> There is a $5000.00 per month penalty for failure to complete installation and start-up of the treatment system by July 1st. This will require that all equipment and the building are either on order already or ordered very soon. We will need to line up subcontractors for equipment placement, plumbing and electrical to ensure there are no delays. The deadline of July 1st is aggressive and will require a significant effort to meet.

(GC Exh. 25).

Fischer responded to Knisley by email on April 1, indicating that he was out of the office in training that week and would be unable to contact him until the following week. (GC Exh. 26). On April 16, a conference call was held with Jaramie Logelin of MPCA to discuss the compliance schedule. Participating for Respondent were DiBiagio and Fischer, as well as Liesch representatives Knisley and Mike Johnson. During this conference call, Knisley made handwritten notes. (Tr. 218-225). These notes included six bullet points:

1. Chasis[sic], Loaders, Cabs hubs & pumps painted prior to getting to Terex

2. Install a hanging conveyor to have parts conveyed through wash bay to remove all carts from entering wash bay

3. Remove old galvanized ductwork & replace with stainless steel ducting

4. Reduce volume of water being sprayed by 60%

5. Wheeled units being completely outsourced – painting & fabricating

6. Small bay will still be used for small fabricated steel parts & possibly remove the phosphatizing process – or conversion coating

(Resp. Exh. 1).

Knisley testified that all of the bullet points were points that DiBiagio expressed during the call. (Tr. 223). The first bullet point signified that Terex was proposing to outsource the painting of all of these parts. (Tr. 219-220). With respect to the second bullet point, "Terex thought that the carts carrying the parts into the wash bays may be a source of the zinc" because of the chemistries with which they are sprayed," and Terex was proposing "to eliminate those carts from going through the wash bay." (Tr. 221). As for the third bullet point, Kinsley testified that the galvanized duct work had a zinc coating which they "believed there could be enough liquid getting up there or chemistry getting up there to cause zinc to be coming back down into the wash bays, so they wanted to remove that." (Tr. 221). The fourth bullet point was a reference to the reduced volume of water being sprayed that would occur with outsourcing. (Tr. 221-222). Knisley testified that the fifth bullet point was a statement by Terex indicating that they were planning on outsourcing both the fabricating and the painting of the SSLs (wheeled units). (Tr. 222). The sixth bullet point was a reference to the phosphatizing or conversion coating process, which was federally regulated and the reason the plant needed a waste water permit with MPCA. (Tr. 223). DiBiagio testified that during this

conference call, an agreement was reached on three things: (1) the waste water treatment option was complicated, (2) there was no guarantee that such a facility would result in full compliance with the standards, and (3) outsourcing—thereby eliminating the source of contamination, was the best option.

Also on April 16, DiBiagio conducted a town hall meeting with employees. The transcript of this meeting reflects the following remarks by DiBiagio regarding the zinc issue and outsourcing:

> And then I put a little thing up in the corner there. The WWTP, that's the Waste Water Treatment Plant. We, we do still have some high zinc readings coming out of our paint booths. What the EPA has requested is that we put in a waste water treatment plant that's going to cost about $400,000 to install, and probably about $3,000 to 5,000 a month to maintain. It also means bringing in chemicals that we really don't want to bring into this facility. It also means there is going to be a hazardous material generator from those chemicals. We don't want to be in that classification. So, we do know that there's still some things in there that go through there that have zinc in them. We've got to continue to pare that back so that it stops happening. We're also looking at getting rid of the spits and things because there is tin in the caster material. There's tin on the bolts, or there's zinc on the bolts, rather. There's zinc on the casters and we're still running the stuff through there. So, we're taking a look at what we can do. We're also looking to see what we can do to get out of the sodium phosphate altogether and use some other more environmentally friendly chemicals in there to get the acid wash, in lieu of the acid wash use something else. Because it's not just the cost of putting it in, it's once we get something that like in here, it's really not a good thing to have in a plant. We are looking at different ways to get things out.
>
> ***8:36***
> One of the things to eliminate the spits is to put in a hanging system, okay, to hang things on the track you go through like we do in the small booth and different things like that. Also, take a look at is there some of that stuff that we should be outsourcing and bringing other stuff in, so we might want to set that aside and get

> that rebalanced in such a way that we just eliminate the stream to start with, or significantly reduce the generation of all that. So, we're looking at all that; that is an issue right now that we are looking at.

(GC Exh. 53(a)).

On April 18, Joan Hoeschen provided an "updated cost savings estimate to paint the PT30/50/60/70/80 chassis at Weisgram." ((Resp. Exh. 61). This reflected that it would cost less to have these chassis painted by Weisgram than to paint them in-house. (Tr. 1713-15). On April 21, Hoeschen, DiBiagio, and Antilla visited Weisgram's facility to tour the facility and confirm that Weisgram had the capacity to handle Respondent's business. The visit did in fact satisfy Respondent of Weisgram's capabilities. (Tr. 1715-16, Resp. Exh. 62).

On April 30, a second conference call was held with MPCA. The participants were the same as for the April 16 call. Knisley's notes of the meeting reflect the following:

> Terex is working with outside suppliers to fabricate & powder coat parts outside of Terex.
>
> Provide MPCA with a schedule of milestones & dates of completion for each step by 5/7/14.

(Resp. Exh. 2).

Knisley testified that the May 7 date was a date that Terex and Liesch proposed to MPCA by which a schedule would be submitted. MPCA had been very cooperative in the past regarding extending deadlines, almost none of which had been met, but that with the March 31 SOC and the April conference calls, it was clear in his mind that the July/August completion dates were going to be firm dates. (Tr. 228-229).

Immediately following the April 30 conference call Knisley began working with Respondent on the schedule that was to be submitted by May 7. The tasks and completion dates set forth in the letter were what the parties had agreed to in the conference calls. Knisley prepared a draft, which he reviewed with Respondent, and ultimately submitted to MPCA on May 12. (Tr. 230-231). The letter indicated that Respondent was proposing to have all loaders, chassis, and pre-assembled parts (e.g., drive motors and pumps) painted by outside vendors, no later than July 1. (GC Exh. 27). On July 1, the MPCA issued a new SOC reflecting, with some modification, the tasks and target dates proposed by Respondent. Compliance with all limits was to occur by August 31. (GC Exh. 28). Once the decision was made to outsource, it took a number of months to effectuate the decision to the fullest extent. Thus, quotes continued to be solicited and some parts continued to come in unpainted throughout the summer months. (GC Exhs. 62-83).

F. The S&OP Process

Respondent uses an S&OP (sales and operations) process in which sales and operations evaluate the sales forecast and consent to the plan. This plan drives the budget, material planning, and scheduling. The S&OP process occurs monthly and consists of five steps. In step one, Jodie Adams—located in Fort Wayne, Indiana—gathers data from all of the facilities in Respondent's construction segment regarding the previous month's results. In step two, Adams gathers and distributes the most recent sales forecasts for all machines, by month, for the next twelve months. At step three, each facility responds to the forecast. At the Grand Rapids facility, Production Control Manager Lori Gill is

primarily responsible for this step, although she coordinates with other departments such as materials, finance, and engineering. (Tr. 1262-64).

As part of the step 3 process, Gill performs what is referred to as a "level loading" process in which she attempts to level production, capacity, and materials on a quarterly basis. Gill prepares a summary power point presentation, which is used for discussion on the step three call. This call typically takes place around the 15th of the month. The Grand Rapids participants include DiBiagio, Gill, the master scheduler (Jennifer Baker), the engineering manager (Bill Wake), the finance manager/controller (Missi How), the purchasing manager (Travis Anttila), the human resource manager (Deb Schultz), the assembly manager (Dallas Gravelle), and the paint/weld/fab manager (Joan Hoeschen). Other participants include Jodie Adams, as well as TCA representatives and managers (Dean Barley, Ken Doan). TCA is the sales arm for all of the facilities in Respondent's construction segment. The third step call typically takes about an hour to complete. (Tr. 1264-67).

The step four meeting is similar to the step 3 meeting, but much shorter, and involves consenting to the plan. In preparation for this meeting, Gill revises the level load if there have been any revisions in forecasts or changes that came out of the step three meeting. The results of the step four are then taken to a step five, which is held with George Ellis and his direct reports. DiBiagio and How participate from Grand Rapids. (Tr. 1268-69).

As noted, the step 3 meeting involves a review of a summary power point presentation prepared by Gill. This document typically includes, among others, pages

covering the prior month's results, the current month's plan, the prior month's forecast level loaded, the current month's forecast level loaded, discussion items, backlog/open slots, a summary of changes in the forecast by quarter, a comparison of the current year to the prior year, and any hiring updates. The level load itself reflects the actual production by model for the prior months of the year, the current month's plan by model (the consensus for the prior month), and the forecast level loaded by model for each month of the remainder of the year. (Tr. 1269-98). For example, in the March S&OP, the plan for March was to build over a 17-day month roughly 8 CTLs and 2 SSLs per day. The level loaded forecast for the second and third quarters was to build roughly 7 CTLs and 2 SSLs per day. (Resp. Exh. 17, p. 5).

DiBiagio testified that the manufacturing process requires that many activities be "coordinated and synchronized." The S&OP process is an essential part of the synchronization process. Respondent utilizes a number of components—engines, pumps, cooling systems—that may take as long as a year to receive. Thus, these components must be purchased long before orders for machines are received in order to avoid long lead times on delivering finished machines to the end customer. On the other hand, other components may be delivered on a daily basis. Thus, the plant has to guess at its forecast in order to have enough inventory of components, but not too much. The S&OP process is also used to manage other resources, most notably capacity. Respondent uses the term "capacity" not as a measure of physical space or equipment capability, but as a measure of head count. This is so because Respondent utilizes very little equipment and

infrastructure. Thus, the majority of its capacity comes from its staffing levels. (Tr. 1570-74).

G. Plant Performance

In 2013, Respondent shipped 2,323 machines, of which 872 were SSLs. (Resp. Exh. 17, p. 9). The operating profit for the fourth quarter of 2013 was just under $1.4 million. This profit offset substantial losses from the first three quarters, leaving a net operating profit for the year of $66,000. While this profit was miniscule, only 0.1% of sales, it was the first year that the facility had shown a profit since Terex had acquired it. Labor absorption, which is a measure of efficiency, was very good in the last quarter of 2013, averaging 110% per month. (Resp. Exh. 49). The total backlog at the end of December 2013 was 649 units, including 42 SSLs. (GC Exh. 84).

Although the plant was performing well in the fourth quarter of 2013, there was a decline in weld/fab work. Whereas Respondent built more than 80 SSLs per month in the second and third quarters of 2013, it only built an average of 61 per month in the fourth quarter. (Resp. Exh. 18, p. 8). Because weld/fab was heavily dependent upon SSLs for its work, there was an adverse effect on that department. As a result, in November 2013, two employees, Jason Basker (welder) and Rory Sisco (fabricator), were transferred to the cab subassembly and undercarriage areas, respectively. They continued, however, to be classified and paid as welders or fabricators. (Tr. 1819-20; GC Exh. 98). DiBiagio testified that the plant went into January "a little light," and that Respondent let some of the temporary employees go in January. (Tr. 1590-91; GC Exh. 32). However, some additional orders were received and there was enough work to keep the facility operating

in January and February without any regular employee reductions. Additional temporary employees were either brought back or hired in February, March, and April, although some were assigned to different areas. (GC Exh. 32).

Although no regular employees were reduced in the first quarter of 2014, several employees were transferred from weld/fab to other areas of the plant as a result of the continuing decline in SSL orders, particularly by Takeuchi. Indeed, Respondent averaged only 37 SSLs per month in the first quarter, roughly 35% fewer than it built in the fourth quarter of 2013 and more than 50% fewer than it built in the the second and third quarters of 2013. (Resp. Exh. 18, p. 8). In Late January, Deb Schultz and Joan Hoeschen met with these employees and advised them they were being reassigned due to declining work. The employees were told that Respondent did not know exactly how long the transfers would last, but that it would be at least several months. Because the transfers were hoped to be temporary, the employees were advised that for the time being, their current classification and pay would be maintained, and that they would be advised if that changed. Welders Tony Wilson, Al Rimmer, Jason Basker, and Mike Kossow[6] were transferred into assembly, as were fabricators Larry Andrews and Rory Sisco. Welders Ryan DeBock and Mike Willson, as well as fabricator Brandon Rajala, were transferred to test track. Fabricator Jim Baldinger was transferred to the warehouse. All of these transfers took place in February. (Tr. 1818-19, GC Exh. 98).

The facility continued to be profitable in the first four months of 2014, with the operating profit increasing each month from $205,000 in January to $422,000 in April.

[6] Kossow had suffered a work injury, which required accommodation.

(Resp. Exh. 50). Several alarming trends, however, were occurring. First total machine backlog was trending downward. Total machine backlog dropped 40% between January 1 and May 31: 649 units (end of December) (GC Exh. 84); 644 units (end of January) (GC Exh. 85); 580 units (end of February) (GC Exh. 86); 522 units (end of March) (Resp. Exh. 47, pp. 53-56); 426 units (end of April); 391 units (end of May). DiBiagio testified that a backlog of over 600 units is preferred, but over 500 is considered good. Below 500 is a cause for concern. (Tr. 1604-05). Exacerbating the issue was the dearth of SSL orders. The majority of work in the weld/fab department was on the SSL large parts, which were still being produced in-house. The backlog of SSLs was quickly being eaten up, and as Respondent entered into the month of June it had a backlog of only 8 SSLs to build. (GC Exh. 88). This decline in SSLs was attributable in part to the decline in Takeuchi orders. In 2013, Takeuchi ordered approximately 500 SSLs. Unfortunately, Takeuch had seriously overestimated its ability to sell these SSLs, and less than 200 had been sold in 2013. As a result, Takeuchi was ordering very little in 2014. (Tr. 1591-92).

DiBiagio testified that in May, the declining backlog and the diminishing forecast for the coming months caused him to become concerned. In order to "hope for the best" and "plan for the worst," he started looking at the order rate on a daily basis. As orders declined and the plant shipped more than it was booking, DiBiagio concluded that if the trend did not change, "we would be in a position where we would be way over capacity going into July." Accordingly, in his own mind, DiBiagio began formulating alternative plans depending on varying scenarios of orders. Around the end of May, he began sharing some of his thoughts with his management team. (Tr. 1609-1611).

Not only was the backlog dropping quickly, but the product mix was changing for the worse. The most profitable, as well as most labor intensive, models are the large frames. In the fourth quarter of 2013 and the first quarter of 2014, the mix between small frame and large frame models was roughly 50-50. In the second quarter of 2014, however, small frame models accounted for 60% of the mix. The projection for the third quarter was that small frames would constitute 70% of the mix. (Resp. Exh. 38).

The record reflects that beginning in April, it became increasingly difficult to fill all of the available slots on the production schedule. [7] On April 22, Gill penned an email attaching an updated backorder report for May through December. She noted that "we currently only have 5 orders in the backlog reflected for May SSL's. We are in need of purchase orders by tomorrow to continue to schedule the machines through fab/weld & paint to ensure we don't lose slots." (Resp. Exh. 20). Gill explained that the chassis and loaders must be scheduled for weld/fab two weeks prior to when they are scheduled to be assembled. (Tr. 1286). Further, paint must be scheduled three to four days in advance. "And those orders, when they go to paint, are specific to a customer order. So now I don't -- I am within even a shorter period, a window, and I don't have jobs to give to paint to paint skid steers. And if I don't paint the skid steers, I am not going to be able to build the skid steers." (Tr. 1319-20).

On April 24, Gill sent another email, stating: "We are at serious risk of losing build slots in May. We need two SSL purchase orders today so that jobs can be

[7] Gill testified regarding a number of emails she sent and received. Most of these emails were sent to multiple recipients, including responsible managers at TCA, Respondent's sales arm. Respondent will not identify the recipients except where necessary.

distributed for paint to begin on Monday." (Resp. Ex 20). Gill explained: "It is the same situation and it had actually gotten worse, that if we didn't get -- we were planning to build two machines a day on the skid steers. If we didn't get those purchase orders at that factory that day we were going to lose. So each day we didn't get two orders, we were going to lose two machines. So off of our total of 35, we were at the risk of losing two machines every day if we didn't start getting those purchase orders at a minimum of two a day." (Tr. 1320).

On April 25 master scheduler Jennifer Baker sent Gill an email showing the May calendar and which of the planned build slots were filled with actual orders. Gill testified that Baker was telling Gill that "she only has five machines that are committed to firm customer orders. She has plans on the 5th, the 6th, the 7th to build machines through production, but she has no customer orders to put in there, so we can't build those machines." (Tr. 1329).

In an email dated April 30, Gill noted that there were many open slots for May and inquired as to possible orders. TCA manager Ken Doan replied later that day stating that he could fill some of the slots and would work on others. (Resp. Exh. 22). In an email dated May 6, Gill noted that there were still 30 open CTL slots and 10 open SSL slots for May. She advised: "we have been rescheduling production to continue to keep the lines full, however, we are at risk of losing slots and therefore sales in the month of May if we do not begin to receive orders in the next day or two." (Resp. Exh. 23). Gill explained that she was "looking at the orders we did have, based on materials, where we could go outside of the level plan. So if we were planning to build three PT30s a day, and we had

orders later in the month but we didn't have a PT110 order, could we build five PT30s in a day? So we were playing with those orders and looking at all the materials, as what can we build that was outside of the level plan? So we weren't able to build to our plan, but what exceptions could we make to the plan based on the materials we had available, so we could keep the lines full and running." (Tr. 1350-51).

In an email dated May 7, Gill asked Ken Doan and Dean Barley what confidence they had in their ability to fill the 18 PT 110 slots for May. She followed up with another email later that day asking whether certain Vermeer and CEG 110 orders for June could be built and shipped in May. Barley responded, "No for Vermeer." (Resp. Exh. 23).

In an email dated May 8, Gill proposed to DiBiagio that they create 3 PT 110 slots as "stock machines" in order to fill available slots in hopes that actual orders would come in. (Resp. Exh. 24). Gill explained: "we were asking the sales for the 110 open slots, because on May 6 we still had 18 110 open slots. Again, because of the level load, we were planning to build an X number per day. We had no more orders. We had no options to pull forward. We had nothing coming from sales telling us what those orders would be. So what I was asking Jim for permission to do is, at the factory, to start building 110 machines into our stock inventory, with the assumption that we would get the orders before the end of the month, that we could ship these. Typically, Grand Rapids does not build stock machines, so this was an exception and I went to Jim for the approval to build stock machines so that we could keep the lines running at the planned 110 rates and at the planned production rates." DiBiagio approved this request. (Tr. 1359-60).

In an email dated May 9, TCA sales operations manager Mark Luttmann indicated that sales had added orders for two PT-30, four PT-60, and three PT-70 machines, but that a PT-50 slot had opened due to a quality cancellation and that there were now 17 open PT-110F slots. (Resp. Exh. 25(a)).

The third step planning call for May occurred on May 14. At this time, there were still 21 open slots for CTLs, including 16 PT 110F machines, which are the most profitable and labor intensive machines Respondent produces. Further, although the plan called for 38 SSLs to be built in June, there were 35 open slots. (Resp. Exh. 26, p. 7).

On May 20, Gill sent an email indicating that production for May would be short by 3 SSLs and 2 PT 110 CTLs. Further, 2 PT 110s would be built for inventory and shipment in June. On May 21, Gill sent an email indicating that the 2 open PT 110 slots had been filled, albeit with smaller models. (Resp. Exh. 28). Later on May 21, Gill sent an email stating that 27 of the 30 SSL slots for June were still open and that 25 CTL slots remained open, including 22 PT 110s. (Resp. Exh. 29). This led to back and forth emails with sales regarding efforts to fill these slots. On May 23, Gill notified Ken Doan and Dean Barley at TCA: "Currently regarding June SSLs after Monday June 2nd we have no orders to build. Until Blue Line becomes a go, do you have any insights to orders that will be coming to fill the production slots? The June machines start through paint next week. Without orders, we will start to loose [sic] slots." Barley replied a few minutes later : "Nothing at this moment in time. Blue Line is not firm and we should not assume even though we feel we will get some. (Resp. Exh. 30). On May 23, Jennifer Baker sent an email indicating that 7 units were being built as inventory. (Resp. Exh. 31).

H. June – Decision To Conduct Layoffs

The situation became more dire in June. The consensus May forecast called for the plant to build a total of 152 machines in June over 17 days, including 30 SSLs. (Resp. Exh. 36, p. 3). Yet Respondent entered June with a backlog of only 8 SSLs. On Monday June 2, a meeting was convened to discuss "staffing planning for all areas, given June's production rates and open slots. (Resp. Exh. 69). In attendance were DiBiagio, Schultz, Gravelle, and Hoeschen. Schultz was uncertain whether the other recipients of the invitation attended. Schultz testified that the participants at this meeting discussed concerns regarding the lack of skid steer orders, the declining order rate, the number of open slots that were still unfilled for June, and the likelihood of obtaining the large Blue Line order that Respondent was seeking. They discussed the possibility of staffing reductions if the orders did not pick up; however, no actual decisions were made. (Tr. 1823-24).

The following day, June 3, Schultz went out on a family medical leave and did not return to the facility until June 16. (Tr. 1825). DiBiagio, however, had informal "meetings" with various staff members, which were really conversations that he started by walking into offices to discuss the issues. There were other more formal meetings over the first two weeks of June between DiBiagio , Gravelle, and Hoeschen to discuss various scenarios. (Tr. 1611-12).

During June Respondent was continuing its efforts to obtain business and orders that would stave off the need for a reduction-in-force. The Blue Line business appeared to be the best opportunity to pick up significant orders, both for CTLs and SSLs.

DiBiagio testified that the plant had quoted "a sizeable contract with a company called Blue Line," which was a rental company that was looking to replace its "aging fleet of equipment, of which skid steers and track machines were part of that equipment -- not our products, but our competitors' products. And they approached us, as well as several of our competitors, to bid on that contract, and if we had won that contract, it could have been a couple hundred machines for the balance of the year, just from that one contract. So we were very anxious about getting that contract." (Tr. 1688-89). Unfortunately, in early June, Respondent learned that it had not obtained the work.

Apart from waiting on word from Blue Line, Respondent was continuing to do everything it could to keep the lines running. On June 4, Mark Luttmann sent Gill an email asking if the facility could "replace 5 PT 110/110F slots with PT 30 slots." Gill replied later that day: "Given our current planning rates on materials, we could add 2-4. However we feel we can make the expedites needed to add the 5 as requested. Please send the PO's before Friday to ensure materials are reviewed/planned accordingly." Resp. Exh. 35, pp. 6, 7).

On June 9, Jennifer Baker sent an email to Mark Luttmann requesting that TCA "have stock POs submitted to the factory, so we don't lose the build slots. (Resp. Exh. 35, p. 3). Luttmann directed TCA staff to drop 9 stock orders for PT 30s. Baker responded to Luttmann that they only had 5 CTL slots open for June and asked which of the 9 should be added. (Resp. Exh. 35, p. 1; Tr. 1387-88).

On June 10, DiBiagio conducted a town hall meeting with employees. In this meeting, he stated:

So, a quick May update; the results for May. No injuries; so again no injuries, no loss time, no reportable injuries since January, so that's awesome. Let's keep that going. Our shipments, we shipped 154 machines and what I mean by shipped 154, that's how many we made and transferred to TCA. Most of theirs shipped, but we did about 154 machines last month. Our operating profit, we had another month in the black. We made $111,000 and I'm going to talk about that in a second. But we ended up backlogged with 403 units. That's about 100 down from the prior month and, remember, I keep saying as long as we're above 500 units we're okay. So that's like 3-1/2 months' worth of backlog; 403 is not a good spot to be at. It's really dropping. We booked less than half of what we shipped last month, so it is declining.

Our outlook for the next couple of months is getting light. Our June production plan is only 130 machines. That's all we've got. I mean that might go up by a couple by the time we get through the next week. We've booked a couple that we didn't ship, but right now we've only got 130 in the plan and that's all we have. That's barely enough to get through the month. What that means is we've done a lot of work to lower our break-even point so we can produce less and still make a profit by all the accomplishments that everybody collectively has done and the improvements we've made. Last year at this time, we were pushing anywhere from 185 to 210 units and we were losing money. Here we made 154 and actually making money. But it is coming down and we're getting more things thrown at this number here and that are going to kind of hurt us a little bit, too. The projection for June in terms of profitability is that our roll is going to end. We're expecting that all things equal, just with the lower production, we'll probably lose about $168,000. With that, what's not in that number is Cat just pushed out another 50 undercarriages into July. That's going to take probably about $30,000 out of that. We're looking at minus $168,000 plus about another $30,000, so just shy of $200,000 we're probably lose this month because of low orders and, well, low orders that's the real reason.

Any questions about where we're at and anything like that? In the next couple months we're going to be pretty, lean, pretty thin. We had a big -- and I ask if you had any questions and I haven't stopped talking. We had an opportunity for a big order with a company called Blue Line.

. . . .

> We actually had, oh gosh, like 1500 machines out there to be bid on and we bid on the business, and we were down to the last couple of what about 300 of them and that fell through. We just found that out at the end of last week[8] so that fell through, unfortunately. We were hoping that would kind of fill us up for the next couple months, you know, getting one order for a couple hundred. Blue Line is a rental company. They bought Volvo's rental equipment business so they have thousands of machines. They had like 3000 machines that they want to turn over in the next two years in their fleets because they're getting old that they got from Volvo. A big part of their machines is the skid steer (unintelligible) . . . in their rental business. We didn't get any. They told us that the good news is that we became a preferred supplier, but they didn't give us any order so we'll see what happens next time around. So that's that. Any questions where we're at or where we're headed?
>
> . . . .
>
> They're having a sales conference either next week or the week after, TCA. They're pulling everybody in to talk about what they need to do to get more orders in and that kind of thing. But I'm not sure what they're going to discuss and what the opportunities are. So anyway, we're going to be a little soft. It's going to be really tough financially so we're going to offset some of the gains we've had. We'll try to keep that to an absolute minimum. Sometimes you've got maximize your gains and sometimes you gotta cut your losses. So we're trying to keep our losses to a minimum. But I just wanted, this is a heads up, it looks like what we've been running since last September is pretty much coming to a halt because we don't have enough work.

(GC Exh. 53(b)).

On June 11, the third step S&OP meeting for June was held. At this time, the level loaded forecast reflected only 12 SSLs being built in June, dropping the total daily production rate from 9 to 8 per day. (Resp. Exh. 36). Gill testified that the May S&OP

[8] June 10 was a Tuesday. This suggests that Respondent learned around June 5 or 6 that it had not obtained the Blue Line contract.

plan called for 30 SSLs to be built; however, as of June 10, when Gill prepared her presentation, "we only had plan production for 12, and we had no visibility for any additional orders." Of further concern, there was "no [SSL] backlog for July" and "[n]o additional backlog for skid steers for the rest of the year." (Tr. 1390-91).

On June 11, following the third step call, Gill sent an email indicating that 5 more SSLs had been added, raising the schedule to 17 SSLs for June. (Resp. Exh. 37, Tr. 1391-92). She sent another email noting the following revisions that should be used for step 4: " 1) Removed 11 PT 100 G's with Forestry Guarding for the remainder of 2014; 2) Reduced 30 PT 110F volume drivers from Q3; 3) Adjusted down PT 110's based on ytd history; 4) Reduced Q3 SSL's to align with Q4 forecast." (Resp. Exh. 39(a), (b)). Gill explained that during the third step conference call, Respondent decided to adjust the production plan for the remainder of the year due to the declining backlog and lack of orders. (Tr. 1394-96).

On June 12, Gill sent DiBiagio an email containing a chart showing the model mix trends. In the fourth quarter of 2013 and the first quarter of 2014, the mix between small frame and large frame models was roughly 50-50. In the second quarter of 2014, however, small frame models accounted for 60% of the mix. The projection for the third quarter was that small frames would constitute 70% of the mix. (Resp. Exh. 38). On June 13, Gill sent DiBiagio a follow-up email, explaining:

> I realized I didn't explain myself, but only sent the charts. As we consider capacity, specifically CTL, although overall daily rate is about the same, the mix change from large to small models should be taken into consideration. This impacts the capacity available in

> Fab, Paint, Cabs, CTL Assembly, UC, and striding. Possibly engines & loaders as well. . . .

(Resp. Exh. 38). Gill testified "to build those smaller machines takes less time through the different departments and functions than the larger machines. So, although the totals may stay the same, the change in the mix and the size of the machines was an indicator of something we should be looking at." (Tr. 1392-93).

On June 16, Schultz returned from her FMLA leave. That day and the following day, DiBiagio and Schultz discussed the necessity for a layoff. By this time, it was clear that the plant was headed for a downturn. The orders were not coming in, the backlog was dwindling, there were virtually no SSLs to be built, and in DiBiagio's words, "no hail mary" to save the day. (Tr. 1611-12).

A meeting was held in the Grand Rapids Board Room sometime on June 16. In the meeting were DiBiagio, Hoeschen, Gravelle, and Schultz. Because Gravelle had been a supervisor in paint in the past, he was asked to review and confirm the matrix that Hoeschen had prepared. The participants discussed the timing of the layoffs and the "level of when things were coming in powder-coated versus how many people we would need in the interim." (Tr. 1827-28). Schultz explained: "We knew that the business was reducing such that we would have to lay off people, but then that combination of the reduction with the outsourcing and would it be, you know -- how many people at this point in time and then at a later date as well. (Tr. 1828). DiBiagio and Schultz decided on the 16th that the temporary employees would be released. (Tr. 1829).

On June 17, DiBiagio and Schultz worked "over the course of the day reviewing the charts, and the ratings and looking at the team members to make those final decisions." It was decided that day that "there were three painters that would not be needed starting June 26th," and "that the outsourcing and powder-coating of items would have started coming in sufficiently on August 14th, that we would have our second reduction in force on August 14th, and that would be an additional [3] painters." (Tr. 1829,). DiBiagio and Schultz also decided that day how "many welders and fabricators we would need to remain in the area, given the work load that we knew we had. And so it was decided that certain people would be affected by the reduction in force, and that others would be assigned to different areas of the facility." (Tr. 1829-30, 1845-46). They also decided not to announce or implement any layoffs until after both elections were concluded. DiBiagio explained:

> We had the Union campaign and the votes coming up. And we were very, very conscious of that, that we didn't want to do anything that could adversely impact, in any way, shape, or form, the integrity of these elections. So it is -- you know, as you can see, I am a pretty open communicator, and I tell it like it is to the team members. I feel they deserve that. But we were in kind of a different position now, we were concerned as, gee, is this one of those times where we really should not do anything, because we didn't want to create any kind of -- can I say "interference" one way or the other. And, you know, it could be misinterpreted or anything like that, so we elected to not make an announcement, even though we had the plan and we knew we had to do this, until after the last election was done.

(Tr. 1619-20).

Schultz prepared a written document summarizing the decision-making process regarding the layoffs. (Resp. Exh. 66, Tr. 1830). The matrices and Schultz's narrative

were forwarded to George Ellis on the night of June 17, and Ellis approved the plans that same night. (GC Exh. 13, Tr. 1831). These plans called for a layoff of 10 employees (3 painters and 7 weld/fab) on June 26 and a subsequent layoff of 3 additional painters on August 14.

I. Identification Of Employees To Be Laid Off.

In mid-February, Hoeschen provided cross-training matrices to her two leads in welding/fabrication, Jeff McCartney and John Madoll. (resp. Exhs. 15(a), (b)). The matrices contained the names of the employees in the department and a list of job duties that were pertinent to the department. Hoeschen requested that the leads mark the boxes to indicate where each employee had been cross-trained and could perform the job proficiently. (Tr. 311 – 319). McCartney testified that a couple of weeks after receiving the matrices: "Me and John sat down in the lunchroom, and we went through each individual in correspondent with the different areas. And we discussed back and forth because we have switched the role of some of the team members that were underneath each of us. So to better understand where everyone was trained, we talked back and forth about it and we -- if we had any questions about any areas we talked with employees even themselves." (Tr. 1238-39). For example, McCartney was unaware that Mike Kossow had been cross-trained in the 30 quick-attach, but Madoll advised that he had been trained. McCartney spoke with Kossow, who confirmed that this was the case, and McCartney marked Kossow as trained in this task. (Tr. 1239). When they were finished, they gave the completed matrices back to Hoeschen. McCartney and Madoll did not fill in any rating numbers. (Tr. 1241).

At the time that McCartney and Madoll were being asked to complete the matrices, no layoffs were anticipated, and the matrices were intended to be used to identify who could work in what areas. (Tr. 320). On June 2,[9] when DiBiagio, Hoeschen, Gravelle, and Schultz were meeting to discuss the declining business situation and the possibility of layoffs, Hoeschen advised that she already had matrices in weld/fab that would be useful in rating employees for purposes of layoff. (Tr. 342-343). To this end, Hoeschen took the matrices that she had received from McCartney and Madoll and used them to populate a new matrix with ratings from 1 to 4, which she entered in every box where the leads had indicated that the employee was cross trained.

Hoeschen testified that if a team member "consistently met tach, which means they consistently got their parts welded and through their department, or painted through their department, they received a '3,' and that majority if you were -- of the people who were in those positions currently, received a '3.' If they had been –if they had worked in a cell that they hadn't been in for a while, but they were proficient in it when they were there, I gave them a '2,' just because I felt it might take them a little while to get back up to tach." (Tr. 1725-26). A score of "1" signified that the employee did not perform to "tach." (Tr. 1726). A score of 4 indicated that the employee had "a mastery of that area." (Tr. 333). Although Hoeschen had not actually developed such a program, a "4" was intended to signify that the employee could "train the trainer." (Tr. 1726).

[9] Although Hoeschen could not recall the exact date, it is clear that she was referring to the June 2 meeting and not the June 16 meeting. The matrix that she prepared for paint, which she testified was discussed at the same meeting, bears a date of June 2. (GC Exh. 15(d)).

At the June 2 meeting, Hoeschen advised that she could create a similar matrix for the paint department, which she did within a day or two of the meeting. This matrix contains twelve functions, four in the large booth, four in the small booth, and four other individual functions (sanding, touch up, preventative maintenance, and viscosity checks). Wherever an employee had been cross-trained, Hoeschen entered a rating of 1 to 4. Hoeschen based these ratings on her personal observations and knowledge. Hoeschen entered these ratings on her own without assistance. (Tr. 356-357). Although some of General Counsel's witnesses questioned Hoeschen's knowledge and presence on the floor, she testified that she spent 75 to 80% of her work day on the plant floor. (Tr. 306, 358). Further, Hoeschen testified: "I can see when product is moving through the plant, and if we are meeting our -- you know -- if we are supplying product to the next department on time. I can see that. I just watch the flow. I can see how people are performing just based on the quality of the parts that come out of the area." (Tr. 1726-27).

The record contains four iterations of the paint matrix. Although the record is somewhat confusing, Respondent contends that there are actually five iterations and that the chronology is as follows: (1) GC Exh. 15(d) without the handwritten notes, (2) GC Exh. 15(d) with the handwritten notes, (3) GC Exh. 15(b), (4) GC Exh. 15(c), (5) GC Exh. 15(a). Because GC Exh. 15(d) contains handwritten notes, it is obvious that it first existed without the handwritten notes. Thus, GC Exh. 15(d), minus the handwritten notes, is Hoeschen's original matrix, which was prepared following the June 2 meeting. DiBiagio testified that he made these notes for "clarity: "This was a matrix worksheet

that we were reviewing in a meeting, and determining the skill sets required in the paint department, and each of the different portions, the various skill sets in the small booth, large booth, and then some other peripheral types of functions as well. And the rating system that was being used to evaluate those skill sets in that department, as being something that we would use to assess what we would need and what is most important after the reduction in force, that we would need in terms of skill sets." (Tr. 1616). According to DiBiagio, he made the notes that appear on GC Exh. 15(d) a "few days before we formalized the reduction." (Tr. 1616). The notes, however, were originally written by someone else, but DiBiagio re-wrote them to make them more legible. (Tr. 1616-17). The record does not identify the person who wrote the notes, but they do nothing more than identify where specific employees worked, and they draw a line separating the small booth from the large booth.

The third iteration is GC Exh. 15(b). This document is identical to GC Exh. 15(d), minus the handwritten notes, except in one respect. Specifically, whereas Hoeschen initially rated Dennis Feltus in only three tasks, he is now rated in eight tasks.

The fourth iteration of the paint matrix is GC Exh. 15(c). The record does not reflect precisely when this document was generated, but it was likely either on June 16 or early June 17. Schultz testified that she and DiBiagio worked on this document on the 16th and 17th. (Tr. 405-406, 1841-43). This document is in an excel spreadsheet format. It contains the names of the painters on the far left. To the right of the spreadsheet, there are columns for the same functions listed on the prior iterations, except as follows: First, the four functions that comprise the small booth have been consolidated into a single column,

as have the four functions that comprise the large booth. Second, there is a weighting factor to each function and a weighted and unweighted rating for each function. Finally, there is a column for seniority (both weighted and unweighted). To the left of the spreadsheet are new columns for total score, total ranking, weighted score, and weighted ranking. With respect to the rating numbers in the various functions listed (except for seniority) the unweighted scores are identical to those in GC Exh. 15(b), except that the scores in the small and large booths are consolidated scores. For example, in GC Exh. 15(b), Mitch Johnson received scores of 4 in each of the four small booth functions. In GC Exh. 15(c), these scores are added together to produce a single score of 16 for the small booth. In the seniority column, employees are rated from 1 to 11 points with the most senior employee receiving 11 points and the least senior employee receiving 1 point. The weighted column for seniority applies a 50% weighting factor. (Tr. 1842-44).

The fifth and final iteration, on which the layoff was based, is GC Exh. 15(a). It is in a similar format to GC Exh. 15(c), except that the columns for total score, total ranking, seniority, and weighted seniority have been removed, and the employees identified for layoff have been color coded to reflect the date of layoff. The decision to remove seniority was discussed between DiBiagio and Schultz. Schultz testified that they discussed the fact that all the other ratings were 1 to 4, whereas the rating for seniority was 1 to 11. They concluded that this would give excessive weight to seniority, and that they would use seniority as a tiebreaker if the scores were close. (Tr. 1842-43).

As for the weighting factors that were applied, DiBiagio explained that because "the majority of the reduction is impacting the large booth, and there will be a significant

reduction in the large booth, then when we are evaluating skill sets, should we give heavier weight to the small booth versus the large booth, in terms of skill, ability, flexibility after the RIF and us being able to continue to do the work we need to do most efficiently, because we are going to have to be a lot more flexible and versatile after the RIF than before." (Tr. 1618).

J. June 26

On the evening of June 25, Schultz notified the temporary agency that the assignments of the temporary employees were being ended. (Tr. 1848). On the morning of June 26, Respondent met with the ten employees who had been selected for layoff that day. Present for Respondent were DiBiagio, Schultz, Hoeschen, and Gravelle. They explained to the employees the reasons for the termination, and provided them with a package of materials, which included an agreement entitled 'Termination, General Release And Waiver Agreement." These agreements provided for severance benefits to which the employees were not otherwise entitled. Paragraph 5 included a broad release of claims "arising from facts occurring on or before the date I sign this Agreement." Paragraph 5.2 further provides that the employee waives and releases any claims under a variety of federal and state anti-discrimination statutes, including "the National Labor Relations Act." Paragraph 5.3 states that the employee does not "waive any rights or claims that may arise after the date I sign this Agreement" and that "I understand that I am waiving and releasing valuable rights and do so freely and voluntarily." For most of the employees, who were 40 years of age or older, paragraph 9 provides for a 45-day period to review and consider the Agreement and acknowledges that "The Company has

told me to discuss this Agreement and Exhibit A with a lawyer." Paragraph 13 contains a provision allowing the employee 7 days after signing to change his or her mind and cancel the Agreement. For those employees who were under 40 years of age, the Agreement provided only for a 10-day consideration period ending on July 6. No revocation period was included. (Tr. 1848-50; Resp. Exh. 68).

Exhibit A to the Agreement was a chart reflecting the affected job categories and the ages of employees selected for layoff and the ages of employees selected for retention. As it turned out, however, Exhibit A was omitted from the package given to employees on June 26. (Tr. 1851).

Simultaneously with the meetings with the affected employee, Respondent's counsel sent a letter to the Union's counsel notifying the Union of the layoff decisions. This letter stated:

> Please accept this as formal notice by Terex ASV to the Union concerning certain impending management decisions that will impact the Paint Department at the Company's Grand Rapids, Minnesota facility. Although no formal certification has yet issued, the Company acknowledges that the Union is the exclusive bargaining representative of the painters and senior painter who are employed in the Paint Department. The management decisions outlined below were made prior to the June 18, 2014 election, but were not previously announced in order not to interfere with either the Paint Department election or the Assembly Department election that occurred yesterday. Because these decisions pre-dated the Union's designation as the exclusive bargaining representative of the Paint unit, the decisions themselves are not subject to bargaining. However, to the extent that there may be effects of these decisions that were not decided upon prior to the election, the Company is willing to bargain, upon request, concerning these effects. Below is a brief description of these management decisions.

1. Due to a continuing and dramatic downturn in orders and backlog, the Company has determined it needs to modify the regular work schedule for the week of June 30, 2014. On Monday June 30, all production operations will shut down with the exception of Assembly, Quality, and a few support team members (including Paint touch up, Warehousing and Maintenance), who will be required to work in order to complete the June production schedule, and complete all scheduled shipments. On Tuesday July 1 and Wednesday July 2, there will be a complete shutdown of all production operations, including the Paint Department. Thursday July 3 is the pre-planned Independence Day holiday so no work was otherwise scheduled that day. During this shutdown team members may utilize ETO or take the days off without pay or any penalty under the Company's current attendance policy.

2. For the reasons described in brief below, a permanent layoff of three (3) team members in the Paint Department is being implemented this morning. The selection criteria used for this layoff were based on a matrix of skills and abilities in conjunction with an assessment of the type of work that will be required going forward. This reduction in force is necessary for two (2) reasons:

(a) The facility has suffered an overall reduction of approximately 20% in the demand for skid steer and compact track loaders for the entire 3rd quarter. This reduction is expected to continue through the remainder of 2014. All production departments at the Grand Rapids facility will be affected in one way or another by this drop in product demand. The assignments of all temporary workers to the Grand Rapids facility will be ended, and some layoffs of regular team members will also occur. All regular team members affected by this decision, including those affected team members in the Paint Department, are being notified of their layoff this morning.

(b) Due to an environmental compliance action brought by the Minnesota Pollution Control Agency, the Company is required to substantially reduce the level of the zinc discharge associated with its wet painting operation. The only economically feasible way to achieve the necessary reduction in zinc discharge is to outsource many of the parts previously painted in-house to various outside vendors, who will provide most of these parts to the Company already powder coated. This will not only substantially reduce the volume of painting work performed in-house and the associated

zinc discharge, but powder coating will improve the paint quality of these parts.

3. To come into compliance with the applicable limits for zinc discharge, over the summer there will be a further increase in vendor-painted components and a consequent further reduction in the number and type of parts that will need to be painted in-house. Directly related to this reduction in painted parts, there will be a second permanent layoff of three (3) painters on or about August 14, 2014. The three (3) affected team members in the paint department have been identified and selected based on the same matrix of skills referenced above, but are not being notified at this time. The Company's standard practice is to notify affected team members on the date of their layoff.

The managerial decisions described above are necessary due to compelling economic and business circumstances. All laid off team members will be offered severance pay and other benefits as provided under the Terex Corporation Severance Pay and Supplemental Unemployment Benefits Program, which is an employee welfare benefit plan under Section 3(1) of ERISA and was adopted by the Company effective September 15, 2009. While the managerial decisions themselves are not subject to an obligation to bargain, we will be happy to answer any questions and to discuss any issues or concerns that the Union may have arising out of these management decisions insofar as they relate to or impact the Paint Department unit represented by the Union.

(Resp. Exh. 5).

K. Temporary Shutdown

DiBiagio testified that the plan was to reduce the work force by roughly 20%, but that the demand for July was reduced by more than 20 percent. DiBiagio considered several options, one of which was to cut deeper in the layoffs. However, he ultimately decided to extend the already-planned July 4th holiday by taking the first three days of the week out and dividing the demand over the remaining number of work days. This resulted in a level load of about 8 machines per day, which was consistent with the

reduced headcount. Although the plant ended up falling behind on a few orders in July, some employees were asked to work overtime on a Friday to finish up these machines so they could be shipped. (Tr. 1621-24).

L. Ensuing Discussions With Union

On July 1, the Union's counsel sent Respondent's counsel (by email) a letter containing an extensive (40-paragraphs) request for information and demanding bargaining. (Resp. Exh. 6). That same day, the Union filed its first charge, alleging that Respondent had violated sections 8(a)(3) and (5) of the Act. On July 7, Respondent's counsel replied, asserting that most of the information requested by the Union was related to the decision, which was not subject to bargaining as it had been made before the June 18 election. Respondent's counsel, however, attached a copy of the severance plan SPD and an FAQ document that had been furnished to employees, and stated that additional documents would be forthcoming. Counsel stated that Respondent was available to meet with the Union on July 15, 16, and 17. (Resp. Exh. 8). On July 8, by email, Respondent's counsel furnished the Union with certain additional information, including the severance agreements that had been given to the three painters laid off on June 26. (Resp. Exh. 9).

On July 10, the Union's counsel emailed Respondent's counsel, accepting the July 15 and 16 dates, but disputing Respondent's contention that the decision was not subject to bargaining. (Resp. Exh. 10). On July 11, Respondent's counsel confirmed the meeting dates. (CP Exh. 14). The parties did in fact meet on July 15 and 16 for effects bargaining. During these meetings, Respondent indicated that it had determined that Exhibit A to the severance agreements had been omitted. This led to a discussion regarding how to correct

the issue. Emails were subsequently exchanged between the parties. At the Union's request, Respondent sent complete severance agreements with Attachment A both to the Union and the two painters who had not yet signed the agreement, Dennis Feltus and Dale Persson. With respect to Jesse Schminsky, who had signed the agreement on July 2, Respondent advised that it would permit him to revoke the agreement up until he began receiving severance pay.

The final severance agreements were signed on the dates indicated: Vicky Burton (July 18), Mike Kossow (August 12), Tony Erickson (July 18), Ryan DeBock (June 26), Rory Sisco (July 18), James Baldinger (July 18), Jesse Schminsky (July 2), Dennis Feltus (July 22), Lee Kostal (August 20), Rick Andrews (August 28), Kerry Esler (August 18). (Resp. Exh. 68).

M. July Through November

In June, the facility ended up building 109 CTLs and 21 SSLs for an average of 7.6 machines per day. This was a reduction of 2 machines per day from May. (Resp. Exh. 41, p. 4). For the first time in nine months, the plant had an operating loss. This loss was just under $350,000. (Resp. Exh. 50). The backlog continued to be low. At the end of June, total backlog was only 367 units (362 CTLs and 5 SSLs). (Gc Exh. 90). At the end of July, total backlog was 349 machines (345 CTLs and 4 SSLs). (GC Exh. 91). At the end of August, total backlog was 296 units (293 CTLs and 3 SSLs). (GC Exh. 92). At the end of September, total backlog was only 221 units (201 CTLs and 20 SSLs). (GC Exh. 93). At the end of October, total backlog was 201 units (182 CTLs and 19 SSLs). (GC

Exh. 94). At the end of November, the machine backlog was 209 units (82 CTLs and 27 SSLs). (GC Exh. 95).

Actual production also remained low. The facility built 124 units (118 CTLs and 6 SSLs) in July, 131 units (130 CTLs and 1 SSL) in August, and 136 units (132 CTLs and 4 SSLs) in September. (Resp. Exh. 44, p. 2). The plant made money in July, August, and October, but lost money in September and November. (Resp. Exh. 50). The total gains and losses between June and November netted out to a loss of $ 424,000.

DiBiagio testified that the plant began to see a small uptick in skid steer demand in September, primarily through Takeuchi, as its inventory was reduced. In September, Respondent announced a price increase for 2015, and the expectation was that this would trigger more orders in 2014 as customers sought to place orders at the lower prices. (Tr. 1625-26).

N. Reclassification Of Employees

As discussed above, a number of weld/fab employees had been working in other departments for an extended period while continuing to be classified and paid as welders. When the layoffs occurred on June 26, all of these employees were considered along with the other welders and fabricators for the layoff based on the matrix. Some of these transferred welders were laid off, some were moved back to weld/fab, and some were offered permanent assignments in other departments. Schultz testified that those employees who were being permanently reassigned were notified that "their pay would be affected started July 7th" and their "reporting relationship would change immediately." (Tr. 435-440, 1884, GC Exh. 35).

Rajala and Willson were two of the employees who were permanently transferred to test track at the time of the June 26 layoffs. Thus, their pay and classification changed immediately. They continued to work in test track until September when they were transferred to undercarriage to assist with an increased workload in undercarriage. Their pay was not affected as the assembler and test track rates of pay are the same. (Tr. 1883-84).

8(a)(3) ALLEGATIONS

A. Outsourcing

Paragraphs 8(d) and 8(e) of the consolidated complaint (as amended) allege that "Since about May 12, 2014, and continuing thereafter, respondent has outsourced paint department work" because employees engaged in union activities.

B. Layoffs

Paragraph 8(a) of the consolidated complaint alleges that on June 26 Respondent unlawfully "terminated/permanently laid off paint department employees Dennis Feltus, Dale Persson, Jesse Schminski, and welding/metal fabricating department employees James Baldinger, Vicky Burton, Ryan DeBock, Tony Erickson, Anthony Knight, Mike Kossow, and Rory Sisco."

Paragraph 8(c) of the consolidated complaint alleges that on August 14, Respondent unlawfully "terminated/permanently laid-off paint department employees Rick Andrews, Kerry Esler and Lee Kostal.

C. Reclassification

Paragraph 8(b) of the consolidated complaint alleges that on or about July 3, respondent unlawfully "reclassified welding/metal fabricating department employees Brandon Rajala and Mike Willson to assembly department and lowered their wage rates."

ARGUMENT

A. Pertinent Legal Principles

In order to establish a prima facie case, "the General Counsel must first prove, by a preponderance of the evidence, that animus against the employees' protected conduct was a motivating factor in the employer's adverse actions." *Verizon,* 350 NLRB 542, 546 (2007). If this burden is carried, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line,* 251 NLRB 1083, 1089 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981). Although sometimes stated in varying terms, the elements of the General Counsel's case include proof that (1) the employee(s) engaged in activity protected by the Act, (2) the respondent was aware of such activity, (3) the alleged discriminatee(s) suffered an adverse employment action, and (4) a nexus exists between the employee's protected activity and the adverse employment action. *Newcor Bay,* 351 NLRB at 1036; *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Proof of animus toward the protected conduct is an essential element in establishing that the challenged action was unlawfully motivated. *Whirlpool Corp.,* 337 NLRB 726, 726 (2002).

In analyzing the record evidence, the Board must consider the record in its entirety and not just the evidence that supports the General Counsel. The Board "is not free to

prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Allentown Mack v. NLRB,* 522 U.S. 359, 378 (1998). The evidence in support of a particular conclusion "must be substantial, not speculative, nor derived from inferences upon inferences." *Brown & Root, Inc. v. NLRB,* 333 F.3d 628, 639 (5th Cir. 2003). "The Board may not raise suspicion to status of fact or base inferences upon mere speculation, … and findings of the Board must rest on evidence, not on surmise or suspicion." *Baird-Ward Printing Co.,* 109 NLRB 546, 567 (1954). "Particularly is this true when inferences are utilized to overcome direct and positive testimony." *Roadway Express, Inc.,* 119 NLRB 104, 115 (1957), *enf'd,* 257 F.2d 948 (4th Cir. 1958).

"The ultimate burden remains, however, with the General Counsel." *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Thus, "a finding that the General Counsel has met the initial Wright Line burden by making a showing sufficient to support the inference that protected conduct was a motivating factor in [the employer's decision] does not mean that the [decision] was in fact 'unlawfully motivated.'" *Tom Rice Buick,* 334 NLRB 785, n. 7 (2001). Although the employer bears the burden of establishing its "affirmative defense" by a preponderance of the evidence, the evidence that will suffice to establish this defense is not unduly onerous. "Nothing in the Board's Wright Line decision indicates that the employer's burden cannot be met by using circumstantial, as opposed to direct, evidence," *Centre Property Management v. NLRB,* 807 F.2d 1264, 1269 (5th Cir. 1987), and "[t]he Respondent's defense does not fail

simply because not all of the evidence supports it, or even because some evidence tends to negate it." *Merrillat Industries,* 307 NLRB 1301, 1303 (1992).

In the context of significant business decisions affecting the overall operations of the facility, the Board must refrain from intruding into management's prerogatives. "The doctrine of entrepreneurial discretion holds that an employer may make significant changes in its operations 'so long as its change in operations is not motivated by the illegal intention to avoid its obligations under the Act.'" *Dayton Newspapers, Inc. v. NLRB,* 402 F.3d 651, 665 (6th Cir. 2005)(quoting *NLRB v. J.M. Lassing,* 284 F.2d 781, 783 (6th Cir. 1960)). "Whether procedures other than a layoff might have been more or equally effective in remedying the Respondent's economic loss is not a matter the Board is empowered to decide. The Board's authority to evaluate the Respondent's business conduct extends only to the determination of whether the conduct is discriminatorily motivated or otherwise in violation of the Act." *Gem Urethane Corp.,* 284 NLRB 1349, 1350 (1987); *accord, Kennametal, Inc.,* 358 NLRB No. 108, * 19 (2012).

"Congress has left to management the decisions of whether a reduction in the number of employees is necessary." *Midwest Stock Exchange, Inc. v. NLRB,* 635 F.2d 1255, 1265 (7th Cir. 1980). "The Board does not substitute its judgment for management but instead tries to determine, as accurately as possible, what considerations really motivated management to make a particular decision." *Newcor Bay,* 351 NLRB at 1040.

B. The Outsourcing Decision Is Not The Subject Of A Timely-Filed Charge.

Section 10(b) of the Act requires that a charge be filed within six months of the events giving rise to the charge. As charge number 18-CA-140338, which is the charge

upon which the outsourcing decision is based, was not filed until November 5, it is incumbent upon the General Counsel to establish that the outsourcing decision was made on or after May 5. The record, however, precludes any such finding.

The May 12 date selected by the General Counsel is based on the letter bearing that date from Respondent's consultant (Liesch) to the MPCA setting forth Respondent's plans for alleviating the zinc problem through outsourcing. Yet the record overwhelmingly establishes that the actual decision was made much earlier than May 12. DiBiagio testified that he had made the decision by late February, based in large part upon his distaste for turning the facility into a hazardous waste producer, as well as the substantial costs (both initial and ongoing) of building and operating a wastewater treatment facility. The record affirmatively establishes that outsourcing initiatives began in September 2013 and that by January Respondent was receiving powder coated chassis for the PT-30 model. When it became apparent that this initial foray into outsourcing was successful, DiBiagio decided to move forward on a broader basis. Numerous emails in late March and early April demonstrate that Respondent was moving forward with outsourcing, and Knisley's notes of the April conference calls with MPCA establish that Respondent had abandoned the idea of a wastewater treatment facility in favor of outsourcing. Indeed, Knisley testified that he was unaware of a single affirmative step that Respondent had taken to actually advance the construction of a wastewater treatment facility. Against this evidentiary background, there can be no question that the outsourcing decision was finalized well before May 5. Thus, the General Counsel's

allegation that Respondent's decision to outsource was unlawfully motivated is barred by § 10(b) of the Act.

Insofar as the General Counsel contends that this allegation relates back to the July charge challenging the layoffs, that contention is without merit. The Board applies the "closely related" test set forth in ***Redd-I, Inc.***, 290 NLRB 1115, 1118 (1988). This test focuses on whether (1) the same legal theories are involved, (2) the same factual circumstances or sequence of events is involved, and (3) whether the respondent would raise the same or similar defenses. Although the outsourcing allegations involve the same legal theory as the timely-filed layoff allegations, i.e. that they violated § 8(a)(3) of the Act, the factual circumstances and sequence of events are different. The outsourcing allegations flow from an environmental issue that dates back many years and Respondent's ongoing efforts to remediate that issue. This environmental issue is wholly unrelated to the union organizing campaign. It also is wholly unrelated to the declining business conditions that developed in 2014 and that caused most of the layoffs that are the subject of the complaint. It is true that the outsourcing caused the layoff of some of the painters, but this is an effect, not part of the same unbroken set of facts. The layoff decisions were not made until June, whereas the outsourcing decision was made in late February.

Also, the defenses that Respondent raises to the outsourcing allegations and the layoff decisions are different in many respects. To be sure, Respondent contends that both decisions are unrelated to the union activity, but if that is all that is required to show common defenses, there are no 8(a)(3) allegations that would not involve common

defenses. The evidence that Respondent offered in defense of the outsourcing allegations was different in many respects from the evidence it offered in defense of the layoff allegations. As Respondent noted in a pre-trial conference call, the amendment of the complaint to include the outsourcing allegations expanded the scope of the trial in a meaningful way. Without these allegations, Respondent's defense to the paint department layoffs that were caused by the outsourcing was simple. Because the outsourcing decision was presumptively lawful, all of the issues regarding a possible wastewater treatment facility were irrelevant. The MPCA and Liesch witnesses would have been unnecessary. All Respondent needed to establish its defense to these layoffs was a causal connection between the outsourcing and the layoffs. On the other hand, once the motivation for the outsourcing decision was placed in issue, this defense was no longer good in and of itself. Indeed, inasmuch as Respondent conceded that some of the layoffs were caused by the outsourcing, all that the General Counsel needed to establish to invalidate these particular layoffs was that the outsourcing decision was unlawfully motivated. Further, Respondent's defense now required it to defend its choice to outsource rather than build a wastewater treatment facility. This was a significantly different defense from merely establishing that outsourcing occurred and led to the layoff of certain employees.

For all of these reasons, Respondent contends that the outsourcing allegations are barred by section 10(b) of the Act. As discussed below, however, the allegations are also unsupported by the record.

C. The General Counsel Failed To Establish A Prima Facie Case Regarding The Outsourcing Decision.

Apart from the 10(b) issue, the General Counsel failed to establish a prima facie case regarding Respondent's decision to outsource a substantial part of the paint department's work. Initially, the General Counsel failed to establish knowledge by Respondent of any union activities at the time it made the outsourcing decision. It appears to be undisputed that Respondent did not become aware of any union activity until April 7, when the Union handbilled outside the facility. As discussed above, the record affirmatively establishes that the outsourcing decision was made at an earlier time. Further, the Respondent had no knowledge that the paint department was one of two centerpieces of the Union's campaign until May 9, when the petitions were filed. It is beyond any plausible argument that the outsourcing decision pre-dated the filing of the petitions. This is significant because absent knowledge that the Union intended to file a petition for the painters as a separate unit, there was no reason for Respondent to believe that the painters were any more involved in the union organizing than any other employees in the plant. Indeed, the petition that was filed by IUOE Local 49 in 2012 sought a wall-to-wall unit. Until May 9, Respondent had no reason to believe that the Union had a different organizing strategy.

Also lacking is any showing of union animus during the relevant time period. All of the General Counsel's evidence of animus originates on June 19, the day after the paint election with what the General Counsel asserted was a "meltdown" by DiBiagio as a result of the lopsided results of the paint vote. (Tr. 26). There is not a single piece of

evidence of animus occurring between April 7, when Respondent learned of the Union activity, and June 18, when the paint election was held. The evidence reflects that Respondent held meetings and presented factual information regarding unions in general and the Boilermakers in particular that one might reasonably view as generally unfavorable, but such presentations were protected by section 8(c) of the Act, and nothing in these presentations is sufficient to establish "animus" in any legal sense. Indeed, there is little, if any, evidence that Respondent took any position stronger than stating its belief that a union would not be beneficial and urging employees to get the facts and do their own research.

Interestingly, the General Counsel did not challenge the outsourcing decision until shortly before the hearing when it asserted that it had "newly discovered evidence." This evidence appears to be an internal memo prepared by Adam Hughes, a representative of one of Respondent's vendors, concerning a visit that he had participated in to the Grand Rapids facility on July 11. The memo is dated July 15 and is wholly internal to Custom Products. No agent of Respondent is copied on the memo. In pertinent part, Hughes states in the memo the following:

> Terex is trying to get out of the painting business for two main reasons. They do not have a waste treatment system capable of handling the volume of product they are producing. The union has also just recently succeeded in getting their foot in the door at Terex, but only in the paint department. It is their goal to eliminate painting, therefore eliminating the union in the Grand Rapids plant.

(GC Exh. 17).

The problems with this "evidence" are largely self evident. The statements by Hughes are hearsay of the highest order. First, they appear to represent not what anyone actually said, but what Hughes concluded in his mind were the reasons. Second, on the witness stand, Hughes could not attribute the information to any specific person. (Tr. 160). Third, some of the persons with whom Hughes met were not supervisors or agents of Respondent. Hughes testified that he met with Todd Monroe, Rob Levitz, Travis Antilla, and Clem Moger at various points that day. (Tr. 161). The complaint does not even allege Moger to be a supervisor or agent and Respondent denied the supervisory and agency status of Levitz and Monroe. (GC Exh. 1(bb). The General Counsel offered no evidence at all to establish supervisory or agency status of Moger, Levitz, or Monroe. As for Antilla, Respondent admitted his supervisory status, but there is no evidence that he was the one who made the statements in question to Hughes. Indeed, Hughes characterized his discussion with Antilla as brief. (Tr. 169-170). The General Counsel's "evidence" is inadmissible, wholly non-probative, and may not be relied upon to establish animus or motivation on the part of Respondent.

Insofar as the General Counsel argues that Respondent's animus was "latent" and did not reveal itself until June 19, this argument fails because the event that the General Counsel asserted in its opening statement triggered the "meltdown" was not union activity or the filing of petitions, but shock at the outcome of the paint election. That shock, of course, did not exist at the time the outsourcing decision was being made. Indeed, petitions were not even filed until May 9, long after the outsourcing decision was made.

Although not entirely clear, it appears that the General Counsel intends to argue that because the actual outsourcing was not complete prior to the petitions or the elections, but was ongoing throughout the summer months, there must be a causal connection between the outsourcing and the union activity. Thus, the General Counsel questioned many witnesses about cabs and other parts that were continuing to come in unpainted through the summer months. The General Counsel also introduced documentary evidence of quotes being solicited and steps being taken to facilitate outsourcing over a period of time spanning from April though September. (GC Exhs. 62-83). The significance of these documents is not readily apparent. Respondent acknowledges that there were numerous steps that had to occur before the outsourcing could be effectuated to the fullest extent. These steps could not be accomplished in a day, a week, or even a month. But the motivation issue by necessity must focus on the decision at the time it is made and the motivation of the decision-maker at that time. On these issues, the evidence is clear. DiBiagio was the decision-maker. He made the decision in late February. His motivation was wholly unrelated to any union activity. That the decision could not be fully implemented until months later is immaterial. Indeed, it is clear that Respondent was targeting late summer for completion of the outsourcing and that it staggered the two paint layoffs in anticipation of gradually increasing outsourcing. This was not a series of independent outsourcing decisions over a period of

time. Rather, it was a single decision that took months to implement. [10]

Nor is it material that Respondent and MPCA had still not signed a final agreement at the time of the hearing. The issue in this proceeding does not turn on whether Respondent has achieved compliance with the pertinent standards or whether MPCA is satisfied with Respondent's efforts. All that is material is Respondent's motivation for deciding to outsource. On this issue, the outsourcing decision was clearly a legitimate response to significant zinc issues that had to be resolved in one way or another. While it is clear that Respondent also considered building a wastewater treatment facility and that Liesch included such a facility in its early communications with MPCA, DiBiagio had substantial concerns with building such a facility: becoming a hazardous waste producer, changing the clean nature of the facility, and substantial costs both in capital outlay and ongoing operational costs. DiBiagio was personally resistant to the idea, and he told employees of these concerns. Further, there were considerable advantages to outsourcing. Respondent not only avoided the substantial capital outlay, but the future comparative costs appeared to be either favorable or at least neutral. Perhaps most importantly, outsourcing substantially reduced the root cause of the zinc discharge problem, i.e., the wet paint process, and it yielded what it is generally viewed as a much superior paint coat (powder coating).[11] Thus, the evidence does not show that

[10] Respondent also decided to outsource some of the welding and fabrication of SSL parts, but this decision is not challenged by the complaint. And because of the dearth of SSL order, it has been of little significance.

[11] Even the General Counsel's witnesses conceded the superiority of powder coating. (Tr. 680, 764-765).

outsourcing "was a bad business decision and certainly not that it was so inexplicably bad a business decision as to justify a conclusion that something other than business concerns must have motivated it." ***Kennametal, Inc.***, 358 NLRB No. 108, * 19 (2012).

In summary, the General Counsel fell well short of establishing a prima facie case regarding the outsourcing decision. Assuming that a prima facie case could be found, the record overwhelmingly establishes that Respondent would have made the same decision irrespective of any unlawful motive.

D. The Layoff Allegations Are Barred By Signed Release Agreements.

A significant hurdle confronts the General Counsel's layoff allegations, i.e., all but two (Persson and Knight) of the thirteen alleged discriminatees signed release and waiver agreements in exchange for severance pay to which they were not otherwise entitled. "The Board has found, under circumstances similar to those presented here, that it would effectuate the purposes of the Act to give effect to broadly worded waiver and release agreements signed by employees in exchange for enhanced severance benefits." ***BP Amoco Chemical-Chocolate Bayou,*** 351 NLRB 614, 615 (2007). In evaluating such agreements, the Board applies the factors set out in ***Independent Stave Co.,*** 287 NLRB 740 (1987). These "factors include: (1) whether the parties to the Board case have agreed to be bound, and the position taken by the General Counsel regarding settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any party in reaching the settlement; and (4) whether the respondent has a

history of violating the Act or has previously breached settlement agreements." *BP Amoco,* 351 NLRB at 615.

Taking these factors in reverse order, factors 3 and 4 are clearly satisfied. There is no evidence that Respondent has a history of violating the Act, has breached prior settlement agreements, or engaged in fraud, coercion, or duress. In fact, all of the employees who were 40 years or older were expressly told to consult an attorney and were given 45 days to consider and 7 days to revoke. Because the required attachment was not initially provided to these employees, the agreements were reissued in mid-July and new consideration and revocation periods were provided. Only two employees were under 40 years of age, and consistent with Minnesota law, they were given 10 days to consider the agreement. Also, although the Union's charge initially challenged the agreements as coercive and overbroad, this allegation was amended out, and the consolidated complaint contains no allegation to this effect. This is highly significant. *See Hughes Christensen Co.*, 317 NLRB 633, 634 (1995).

As for the second factor—reasonableness—the Union's charge was filed on July 1, and was being investigated prior to any employee signing the release. Because of the initial snafu with the required attachment, all but two of the employees who signed the release did so on or after July 18. Significantly, Kostal and Andrews were part of the Union's bargaining committee and were present at the effects bargaining sessions on July 15 and 16 and were privy to the settlement agreements before they were even laid off on August 14. Yet both signed the agreement. Clearly, they had more than ample

opportunity to consult the Union before signing, and they must have viewed it as reasonable or else they would not have signed. (Tr. 851-854).

At the time the employees signed the release agreements, the Region had not completed its investigation, but there were (and still are) considerable risks associated with the litigation. The employees were well aware of the outsourcing that had been occurring, which began long before union activity. They also were aware that backlog was dropping and that the demand for SSLs was almost nil. Thus, there was considerable risk that the layoffs would be found to be economically justified. While the employees did not know precisely why they were selected for layoff, any contention that their selection was based on union activity faced substantial roadblocks. With respect to the painters, 10 of 11 painters engaged in union activity. Thus, establishing that any particular painter was singled out because of his union activity would be difficult to say the least. As for the weld/fab employees, while there apparently was some union activity occurring within this group, there was no pending petition or election, and their department clearly was subordinate to the assembly department in terms of union activity, where no layoffs occurred. Further, with the exception of Kossow, Knight, and Rajala, there is no evidence that any of the other laid off weld/fab employees engaged in any union activity. For all of these reasons, it was obvious then, and is obvious now, that litigation involves substantial risks and uncertainties. In this context, the offer of severance pay in exchange for signing a release agreement was a reasonable exchange.

All that is left is the fact that the Union and the General Counsel oppose the release agreements. This factor, however, has never been deemed sufficient in itself to

reject such agreements, when the other *Independent Stave* factors favored acceptance of the agreements. *BP Amoco, supra; Hughes Christensen, supra.* Other Board decisions in which the Board has refused to give effect to release agreements are distinguishable. *Goya Foods of Florida,* 358 NLRB No. 43 (2012) (agreements prohibited future union activity; respondent falsely told employees they had lost their case, and respondent had history of unfair labor practices); *Flat Rate Movers, Ltd.,* 357 NLRB No. 112, * 15 (2011) (employees could not read English and they were not given any time to consider or revoke); *Clark Distribution Systems, Inc.,* 336 NLRB 747 (2001) (agreements precluded employees from assisting in Board investigation and were part of an overall scheme to eliminate union supporters); *Webco Industries,* 334 NLRB 608, 610-611 (2001) (prior history of serious unfair labor practices).

In summary, the layoff allegations, except as they pertain to Dale Persson and Tony Knight, are barred by the severance agreements signed by the alleged discriminatees. At the very least, these individuals are not entitled to any reinstatement or backpay remedy.

E. The General Counsel Failed To Establish A Prima Facie Case Regarding The Decision To Lay Off Employees.

The layoff decision affected two groups of employees, those in the paint department and those in the weld/fab department. Although temporary employees provided by an agency who were working in assembly and other departments had their assignments terminated, no regular employees in assembly were laid off. In assessing the

General Counsel's prima facie case, it is necessary to examine the paint department separately from weld/fab.

1. Paint Department

Respondent acknowledges that the actual layoff decisions were not finalized until June 17, one day before the paint department election. Thus, knowledge of both union activity and the paint department petition is established. While Respondent did not know how every painter felt on the Union issue, it certainly knew that Lee Kostal was a primary supporter as he appeared at the representation hearing on May 20. The General Counsel undoubtedly will argue that animus is established by the 8(a)(1) allegations (if violations are found) and that in conjunction with the timing of the layoffs, a prima facie case is easily established. This argument has superficial appeal, but upon close examination, it falls apart.

In the context of union activity, animus and timing can be something of a floating target, depending on the event one selects for measuring timing and animus. Here, the union activity began in late February, Respondent became aware of the activity on April 7, the two petitions were filed on May 9, the parties stipulated to the paint department election on May 20, the Regional Director issued his Decision and Direction of Election in the assembly unit on May 29, the paint election occurred on June 18, and the assembly election occurred on June 25. Against which of these events should the timing of the layoffs be measured? "The Board has declined to draw an inference of discrimination when the . . . General Counsel picks a self-serving date in an effort to show that the timing of an adverse action is suspicious," ***Kennametal, supra,*** at * 17 (citing *Newcor*

Bay City Division, 351 NLRB 1034, 1039-1040 (2007)). Further, animus is not relevant in the abstract. Its significance flows from the events that create the animus.

As the Board has recognized, "[a]n organizing campaign is a highly charged circumstance and one that an employer might be expected to see as engaging the work force as a whole, regardless of a particular employee's position regarding representation," and [u]nder such circumstances, it is plausible that management would implement a layoff either in hopes that the display of economic power will chill employees from supporting a union, or in order to render certain employees ineligible to vote in an upcoming election." ***Kennametal, supra,*** at *14. But here the timing of the layoffs is not particularly "striking" in relation to Respondent's knowledge of union activity, the petitions themselves, or the scheduling of elections. And the manner in which the layoffs were conducted belies any effort by Respondent to chill union activity or affect the outcome of the elections. Had the Respondent been bent upon influencing the outcome of either election or sending some type of "message," it easily could have implemented the decision before either election. Short of that, it could have announced its decision (or let it leak out) before the elections. But it did neither, consciously choosing instead not to announce or implement any layoffs until after both elections had been conducted so as to avoid any appearance of interfering with these elections. And it is clear that word of the layoffs did not "leak out" before the elections, as no employee claimed to have heard anything prior to June 26. These are not the actions of an employer seeking to gerrymander the voting unit or scare employees into voting "no."

That the layoffs were not motivated by the mere filing of the petitions is further evidenced by the fact that not a single undercarriage or assembly employee was affected by the layoffs. The undercarriage employees were as much a driving force in the two petitions and elections as the painters. Indeed, whereas Respondent stipulated to the paint unit and its election, the undercarriage petition resulted in a contested hearing at which employee David Helvie testified. If Respondent was seeking to quell union activity or send a "message," why were the undercarriage and assembly employees spared?

Relating the layoffs to general union activity and the filing of the two petitions is also problematic because there is not a shred of evidence of animus between April 7, when Respondent first learned of union activity, and June 18, when the paint election was conducted. All of the General Counsel's evidence of animus arises during the week between the paint election and the assembly election. Perhaps it is for these reasons that the General Counsel has placed great emphasis on the two elections, particularly the paint election, as the relevant events for assessing timing. But selection of this date deals a damaging blow to any contention that the timing of the layoffs is "striking" and that the layoffs were unlawfully motivated. It is undisputed that although implementation did not occur until after both elections, the actual layoff decisions were made before either election. This is clearly established by the internal memo prepared by Deb Schultz and submitted to George Ellis on the night of June 17. Indeed, the General Counsel does not allege that Respondent had any bargaining obligation over the layoff decisions, an obligation that clearly would arise if the decisions were reached after the paint election. Thus, not only had the actual decision to lay off employees been made in advance of

either election, but so too had the decision as to number of employees, identity of employees, and the dates of the layoffs. If, as the General Counsel apparently contends, the results of the paint department election triggered Respondent's "meltdown" and animus, such animus could not possibly have influenced layoff decisions made prior to that election. Indeed, when the decisions were made, Respondent had no way of knowing what the ultimate result of either election would be.

One might speculate that Respondent suspected that it would lose the paint election, but that is all it is, speculation. Certainly on the morning of the election, when a substantial number of painters showed up wearing union t-shirts, there was some indication that the election might not go Respondent's way, but by this time, the layoff decisions had already been made. There is no evidence in the record that a majority of the painters had openly demonstrated their support for the Union prior to the morning of the election.

The General Counsel appears to rely on a few slides from DiBiagio's final presentation to the assembly employees before the election, in particular, slides 11, 12, and 13 entitled "The Paint Department's Big Gamble." (GC Exh. 12). These slides reference the assembly department's opportunity to watch and see what happens with the paint department and to "sit back and watch in real life what happens to employees who vote for a union." The General Counsel presumably contends that these are references to the upcoming layoffs. In context, however, it is clear that these statements are actually related to the outcome of collective bargaining. The three preceding slides specifically discuss the collective bargaining process, and slide 10 specifically states that collective

bargaining is a big gamble. Slide 12 states: "If the painters get everything the union has promised, as unlikely as that is, you can always sign a new card and ask for another election. You would only have to wait 12 months for another vote." Slide 13 states: "If the union can really accomplish everything they have promised, they shouldn't mind waiting a year before getting your $500 a year in union dues." The gamble referenced in General Counsel Exhibit 12 is clearly the collective bargaining process. It does not constitute evidence that the layoff was motivated by the painters' union activities.

Further, there is no evidence in the record that Respondent sought after the elections to communicate the layoff decisions in a manner calculated to chill union activity. To the contrary, the record reflects that Respondent communicated the decisions as being based on economic and business reasons, and it offered severance pay as it had done in prior layoffs. ***See Kennametal, supra,*** at * 13 ("record does not show that the Respondent made any effort to cause employees to blame the Union for the layoff").

Finally, the decline in orders and backlog was substantial, and the action that Respondent took in response was consistent with what it had done in the past. The record reflects that layoffs have been a way of life at the Grand Rapids facility. Indeed, the actions that Respondent took in the summer of 2014 are almost identical to the actions it took in April 2012.

In all these circumstances, it is difficult to see any plausible theory to support a finding that the layoffs were discriminatorily motivated.

2. The Weld/Fab Department

The deficiencies in the General Counsel's evidence regarding the paint department layoff are equally present in the context of the weld/fab department layoff. Indeed, they are magnified. None of the weld/fab employees were eligible voters in either election, and no petition has been filed by the Union to represent these employees. The General Counsel seems to contend that Respondent laid off some of these employees in order to thwart union activity in that group. One problem with this theory is that the record does not establish that there was significant union activity occurring within this department, much less that Respondent was aware of such activity. It is true that Mike Kossow was a known union supporter from the past and that he was included within the layoff. It also is true that Kossow solicited cards among the assembly employees, but all of these activities occurred away from the facility and were unknown to Respondent. Kossow was not an eligible voter in either election, and in the months when union activity was occurring, he was working on light duty in assembly.

So, what was it that caused Respondent to be so concerned about union activity within weld/fab that it would take the extreme measure of laying off six weld/fab employees, all of whom were presumably (according to the General Counsel) needed to perform the work that was available? Surely it is not the General Counsel's theory that this action was taken simply to eliminate Kossow. The only two weld/fab employees who testified were Kossow and Tony Knight, and the record contains no evidence of any union activity by the other five weld/fab employees who were laid off (Burton, Erickson, DeBock, Baldinger, and Sisco).

The necessity for a layoff in weld/fab was exacerbated by the dramatic drop in demand for SSLs. Whereas the large parts for the CTLs historically had been obtained fully fabricated and welded from outside vendors, most of the large parts for the SSLs had been fabricated and welded in-house. The complete diminution of SSL orders inevitably affected the weld/fab department more heavily than other departments.

In these circumstances, the General Counsel failed to establish a prima facie case regarding the weld/fab layoffs.

F. The Layoffs Were Motivated By Legitimate Economic And Business Considerations And Would Have Occurred Even In The Absence Of Any Union Activity.

Even assuming that the General Counsel succeeded in establishing a prima facie case with regard to the layoffs, the record overwhelmingly establishes Respondent's *Wright Line* defense. Even when the General Counsel succeeds in establishing union animus, the Board has not found a violation when the respondent establishes legitimate economic reasons for the layoff. For example, in *Stamping Specialty Co.*, 294 NLRB 703 (1989), shortly after employees voted to unionize, the employer (in September 1985) laid off six of the ten production and maintenance employees. The judge found that the employer had made prior unlawful threats and that the employees selected for layoff were union supporters. Thus, he concluded that the General Counsel had established a prima facie case that the layoff was unlawfully motivated. Nevertheless, the judge (with Board agreement) concluded that the employer had carried its burden of establishing that the layoff was in fact the result of a substantial decline in stampings orders. In particular, the employer established that the orders for stampings had declined from $74,793 in January

1985 to $28,006 in September. Further, whereas the stampings orders had averaged just over $55,000 per month during the first 7 months of 1985, they averaged less than $29,000 in August and September 1985. After noting the precipitous decline in stampings orders, the ALJ opined:

> Significantly, the General Counsel offered no evidence that Respondent was unable to fill the orders it received during the months of September, October, or November 1985, with the individuals retained on and after 9 September. I am convinced, and find, that Respondent has shown the 9 September layoff was dictated by economic circumstances.

Id. at 713.

In *Roskin Brothers, Inc.,* 274 NLRB 413 (1985), the Board found that a layoff of nine of twenty warehouse staff shortly after employees signed union cards did not violate § 8(a)(3). Although the Board found that the employer discriminated in selecting the employees to be laid off, it concluded that the layoff itself was economically motivated. The Board emphasized the financial information submitted by the employer:

> The financial statement introduced into evidence shows that the Respondent in 1979 had gross sales of $9,792,751 and showed a net profit of $168,460. In 1980 the Respondent had gross sales of $15,164,822 and, with the above-mentioned cuts in staffing, showed a net profit of $19,114. We therefore find that the Respondent was justified under these circumstances in effectuating a lay-off of its warehouse staff and that such action was not a pretext to mask an unfair labor practice.

Id. at 414.

In *Sunbeam Plastics Corp.,* 144 NLRB 1010 (1963), despite finding that the employer committed significant violations of § 8(a)(1), the Board concluded that the employer thereafter lawfully laid off employees. The Board explained:

> The Trial Examiner found that a layoff of 16 of Respondent's employees, occurring in January, late February, and again on March 9, 1962, was not, as alleged in the complaint, a violation of Section 8(a)(3) of the Act. We agree. He based his conclusion, as do we upon the finding that the layoffs followed, by only a brief period, the cancellation of orders by three of Respondent's largest accounts and the automation of a manually operated machine. Further, the layoffs were accomplished along strict seniority lines, leaving several known union adherents still employed. Finally, several of the laid-off employees were rehired when increased business warranted. Although the timing of the layoffs, following almost immediately upon the heels of the 8(a)(1) conduct described above, raises some suspicion, we find, that the General Counsel has not established by a preponderance of the evidence that union activity, rather than the economic reasons advanced by the Respondent, was the true cause of the layoffs.

Id. at 1011. ***See also, Kennametal, Inc.,*** 358 NLRB No. 108, at * 18 (2012) (employer lawfully laid off employees following unfair labor practice hearing where "facility's variance-to-plan became increasingly poor" and "there was a slump in orders"); ***United States Aviex Co.,*** 279 NLRB 826, 834-836 (1986) (employer lawfully laid off employees following precipitous decline in sales and shortage in raw materials that precluded completion of outstanding orders).

The layoff of most of the painters[12] is directly attributable to the decision to outsource most of the large parts to vendors who would powder coat them. This decision predated Respondent's knowledge of union activity and was a legitimate response to a serious zinc discharge issue that was the subject of a compliance proceeding with MPCA. There were only two possible solutions to the environmental problem—build a wastewater treatment facility or outsource a large part of the wet paint process.

[12] Given the 20% reduction in volume, the layoff of 2 of the 3 painters (20% of 11 is roughly 2) on June 26 can be contributed to the decline in business.

Respondent selected the second option for multiple lawful reasons: (1) avoiding becoming a hazardous waste producer, (2) maintaining a clean assembly operation, (3) avoiding substantial capital costs in excess of $400,000, (4) avoiding annual operational costs in excess of $30,000, and (5) achieving a superior paint coat. These are clearly lawful and plausible reasons for outsourcing, and it is not the Board's province to judge whether this was the ***best*** decision. DiBiagio's aversion to a wastewater treatment facility was genuine.

The layoffs of two painters and five weld/fab employees on June 26 was attributable to the general decline in business, particularly in SSL orders. The evidence of this decline is overwhelming. Several things were occurring during 2014. Total machine backlog dropped 40% between January 1 and May 31. DiBiagio testified that a backlog of over 600 units is preferred, but over 500 is considered good. Below 500 is a cause for concern. Exacerbating the issue was the dearth of SSL orders. The majority of work in the weld/fab department was on the SSL large parts, which were still being produced in-house. In 2013, Respondent built more than 80 SSLs per month in the second and third quarters and more than 60 per month in the fourth quarter. In the first quarter of 2014, Respondent built less than 40 SSLs per month. (Resp. Exh. 18, p. 8). Further, the backlog of SSLs was quickly being eaten up, and as Respondent entered into the month of June it had a backlog of only 8 SSLs to build. (GC Exh. 88). This decline in SSLs was attributable in part to the decline in Takeuchi orders. In 2013, Takeuchi ordered approximately 500 SSLs. Unfortunately, a large percentage of those machines remained unsold at the end of 2013, and Takeuchi was ordering very little in 2014.

Not only was the backlog dropping quickly, but the product mix of the CTLs was changing for the worse. The most profitable, as well as most labor intensive, models are the large frames. In the fourth quarter of 2013 and the first quarter of 2014, the mix between small frame and large frame models was roughly 50-50. In the second quarter of 2014, however, small frame models accounted for 60% of the mix. The projection for the third quarter was that small frames would constitute 70% of the mix. (Resp. Exh. 38). This meant that less labor was needed to build these models.

The General Counsel appears to contend that DiBiagio made statements in town hall meetings with employees that were inconsistent with the asserted need for a layoff. But the statements made by DiBiagio are fully consistent with Respondent's evidence and actually undermine the General Counsel's assertion of unlawful motivation.

Respondent assumes that the General Counsel may rely on the following statements by DiBagio during the April 16 town hall meeting

> ***17:22***
> After that, April looks like it's shaping up to be a pretty strong month. We ought to beat March's performance in terms of profitability. We've had a lot of machines running. We've got a lot of, a lot of, undercarriages put out of here, so it's good; a lot of parts of open sales, so this should be another very, very good month for us. We upped our commitment to corporate. From, you know, last year we made 68 grand for the year, right; in profit for the year. This year we came into the plan at less than a million dollars. What was it like $68,000 I think we committed to deliver positive and then we had such a poor output. Right now, we're going back in. We've upped that to about almost 3-1/2 million for the year and think we're going to up that to about
> 5 million dollars. We were the second most profitable business in the construction group for the first quarter. Okay, there you go. Not so much because we beat everybody else, everyone else lost money but us; us and Terex Global who sells all the parts.

Our plan, what I'm trying to shoot for, is by the end of 2016, and so add three years, we had 2013, 2014, 2015, going into 2016, I want us to be at about 25 machines a day. That's the target, which is 2-1/2 times what we're doing today. And I think we can get there, but we're going to have get space. We've got to put in the infrastructure to be able to roll into that or else we'll overcommit ourselves and we'll fall on our face. By doing these things, it'll position us a whole lot better to grow this business a whole lot bigger than we are today and that's where we're headed.

23:05

So, we'll do what we can. We'll play into our four competencies. We'll do what we do well and exploit that and not get too deep into stuff that we don't do as well. It doesn't mean that people are going. It just means that as we grow in the business, we'll be shifting how we're gonna expand. So, that's what we're looking at. I didn't want anybody to say, oh geez, now they're going in this line and we're going to shut down welding or shut down paint. We're not doing that, but we may be moving the mix around and all that so we can set ourselves up so we can be successful. So you're not in danger of losing jobs or anything like that, okay?

24:34

We're going with quick attach and we brought in another quick attach in, right? That kind of thing, so we're looking at bringing more of the small parts in and stuff that we can turn real easy, real quick that we can do a really good job at. Then the stuff that we know we're gonna be constrained and will be real major obstacles to us down the road, let's farm that out so that we can grow this business and do it in a way that we can be very successful. So, don't be worried about running out of work. Just know that, hey, there's two things that you can count on, right, death and change. It used to be death and taxes, but a lot of people don't people don't pay taxes. They try to get around it and they get away with it. But, death and change, things can change. This business is going to continue to change until we really get in to settle it. So, it's not bad stuff. It's all good stuff. I'm just letting you know about (unintelligible) . . . change of all this. You might see that. You might hear that. You might hear that we're quoting Weisgram to

> do the skid steer chassis. Well, that's because we are, and the reason being is not because you're doing a bad job. It's because, geez, you know it might make sense just to do it all out there because we're not going to be able to grow that as big as we'd like to. So, let's do what we can do, well, and then we'll hire out there so then getting support to help us when we need it. Overall, the plant will get bigger and we'll be hiring more people. We can hire a lot of assemblers, but that's not even hard to do.

(GC Exh. 53(a)).

None of these statements are inconsistent with where the facility was on April 16. April was in fact a good month, and the plant made $422,000. And on April 16, it was not certain that anyone would lose their job. To be sure, this was a possibility in the paint department with the ongoing outsourcing, but depending upon how volume grew (or declined) in the coming months, it was conceivable that the work load might increase sufficiently to maintain the current number of painters. As for DiBiagio expressing hopes of growing the business to where the plant would produce up to 25 machines per day in 2016, that may seem unlikely now, but in April 2014, it was not an impossible plan. Indeed, no one knows what the market will be like in 2016.

Further, these remarks were tempered by numerous cautionary statements by DiBiagio:

> Current order backlog is about 521 machines, which is okay. It's also over 500, it's good. Over 600 is better, but over 500 means that we've got enough to work with and on order. Though we have very few skid steers. I think right now out of all of those, we only have like five skid steers on order right now. Some of that is that orders are backed up in the system that they've been transferring for the last two weeks that aren't really coming through. That should probably dump on us here shortly. It's also all that Takeuchi is still not buying much. I think we shipped them three

> machines last month just to top off some of their requirements, but I think they have what 25 in the forecast for the whole year.
>
> . . . .
>
> So the volume is still a little light, which is why our absorption isn't at 100%. It's kind of in between not enough to really cover everybody really well, but enough to keep us going and enough to keep us busy. We're a little less than 100%, but you see the last couple of months we have been going up a little bit on that side.

In the June 10 town hall meeting. DiBiagio clearly signaled to the employees that the outlook was not very bright. He noted that backlog was poor and dropping, that the "outlook for the next couple of months is getting light" and that the June production plan of only 130 machines was "barely enough to get through the month." He noted that the plant would likely lose money in June and that the Blue Line deal had fallen through. DiBiagio stated that it was "going to be really tough financially" and that "it looks like what we've been running since last September is pretty much coming to a halt because we don't have enough work." (GC Exh.53(b)).

The General Counsel also appears to contend that Respondent worked overtime following the layoffs, thereby suggesting that it needed more employees. But this ignores the fact that the overtime that was utilized following the layoffs was no greater than what had been worked before the layoffs and substantially less than what had been worked in prior years.[13] During the first 16 weeks of 2014 (January through April), the plant worked 3,388 hours of overtime, an average of 212 hours per week. Consistent with the declining

[13] The plant worked 44,703 hours of overtime in 2011 (860 hours per week), 14,727 hours in 2012 (281 per week), and 33,651 hours in 2013 (647 per week). (Resp. Exh. 75).

backlog, overtime decreased in May and June. Over a 10-week period, the plant worked 540 hours of overtime, an average of 54 hours per week. In July, immediately following the layoffs, the plant only worked 140 hours of overtime, an average of 35 hours per week. During the ensuing 14 weeks (August through October), the plant worked 2,610 hours of overtime, an average of 115 hours per week. Although overtime climbed in November to 1,033 hours, an average of 258 hours per week, this was still less than the overtime worked in April. (Resp. Exh. 75). Further, much of this overtime is attributable to the joint venture with Manitex, which was announced in late October. The record reflects that the plant was conducting full physical inventories in November and December in anticipation of the closing of this transaction.

Also, there is no evidence of any increase in overtime in the departments affected most by the layoffs. The weld/fab departments incurred $11,479 in overtime costs[14] during the first 22 weeks of the year (January – May), an average of $522 per week. In June, these departments incurred $694 in overtime costs, an average of $174 per week. In July, these departments incurred $196 in overtime costs, an average of $49 per week. During August through October (14 weeks), these departments incurred $3,283 in overtime costs, an average of $235 per week. During November, these departments incurred $2,124 in overtime costs, an average of $531 per week.

Because the paint department is included on the overtime exhibit with the assembly department, it is impossible to determine precisely how much overtime was worked in paint. What we do know, however, is that the General Counsel introduced into

[14] The exhibit does not break out hours by department.

evidence mandatory overtime notices for the following Fridays: August 15, August 22, August 29, September 5, September 19, and November 14. (GC Exh. 51). Each of these notices identified the departments that would be working overtime; yet, the only notice that affected anyone in paint was the August 15 notice and it was limited to "touch up." None of the notices identified the weld/fab departments.

The General Counsel also appears to contend that the laid off painters should have been given the opportunity to transfer to other departments that was given to some of the welders. This argument fails for several reasons. First, after all of the temporary employees were released, there were an insufficient number of needed positions in other departments to accommodate all of the welders and fabricators, much less the painters. As for why Respondent chose to give this opportunity to some welders and fabricators, as opposed to painters, a number of the welders and fabricators had been working in assembly for an extended period of time prior to the layoffs. Also, because of the outsourcing decision, much of the paint department's work would never be returning.

At times, the significance of the General Counsel's line of questioning became difficult to understand. One line of questioning appeared to be aimed at establishing that work was being performed after the layoffs that certain laid off employees (particularly Lee Kostal, Rick Andrews, Kerry Esler, Mike Kossow, and Tony Knight) were capable of performing. This is a true statement—painting and welding continued to be performed after the layoffs, albeit at a diminished level—but its significance escapes Respondent. The work was being performed by the employees who remained after the layoffs, and Respondent had no need to bring back any of these employees to perform the work.

The General Counsel also elicited evidence that DiBiagio made references to possible insourcing of parts in his April 16 town hall meeting as a means of offsetting some of the effects of outsourcing. DiBiagio testified that insourcing of small parts was something Respondent does look at (Tr. 1601), and in fact, in late May Respondent began steps to insource PT 30 rails "in order to reduce cost and utilize the welding robot." (CP Exh. 10, 11). There is no evidence that DiBiagio ever promised any certain level of insourcing. There is no evidence of specific insourcing opportunities that Respondent bypassed. There is no evidence that increased insourcing of small parts would have had any discernible effect on the layoffs. Finally, the complaint does not allege that Respondent unlawfully decided not to insource or to reduce insourcing. In these circumstances, this evidence seems non-probative.

The record evidence overwhelmingly establishes that Respondent would have conducted layoffs, as it did, irrespective of any union activity or animus. The volume has continued to decline, and Respondent has been able to meet its production requirements with the existing work force.

G. The Selection Process Was Nondiscriminatory.

As Respondent understands it, the General Counsel's primary theory has always been, and continues to be, that the layoff in its entirety was discriminatorily motivated and that Respondent's *Wright Line* defense fails in its entirety because no employee would have been laid off but for the ongoing union activity. As discussed above, this position is wholly unsustainable. Although the General Counsel is not required to parse out his theories in the complaint, Respondent's counsel discussed these theories with

Counsel for General Counsel in advance of the trial to see if the issues and evidence might be narrowed and to see if the selection process was an issue. Respondent was initially informed that selection was not an issue, but was subsequently advised (before trial) that the General Counsel would be challenging the selection of the weld/fab employees who were laid off. This remained the General Counsel's position until after Respondent's opening statement, when Counsel for General Counsel advised that the General Counsel would now also be challenging the selection of the painters. The General Counsel is certainly entitled to adapt its theories as it prepares its case, and Respondent appreciates Counsel for General Counsel's candor in advising it of these evolving theories, but the evidence in support of these theories is haphazard at best.

The General Counsel's evidence, such that it was, focused almost exclusively on attempting to establish the following points: (1) Manager Joan Hoeschen, who rated the employees on a matrix, did not spend much time on the floor and did not really know how well employees performed; (2) Hoeschen did not consult with the Paint Department Leadperson Kerry Esler; (3) Hoeschen's ratings were wrong; and (4) Seniority was removed as a factor from the paint department matrix, thereby adversely affecting Lee Kostal. We address each contention in turn.

Regarding, Hoeschen's knowledge of the employees' performance, she testified that she spent most of her day out on the plant floor with the employees. That some employees did not see her that much does not establish that she was not there. Further, her knowledge was not based merely on observing employees as they performed their jobs, but on evaluating the end results. As the manager of the departments being affected

by the layoffs, it is difficult to comprehend who would be better at evaluating the employees than their direct manager. Indeed, this is an inherent managerial function.

As for Hoeschen not consulting with Esler, he was in the bargaining unit and was one of the employees who was being evaluated for possible layoff. It would not have made sense for Hoeschen to consult with him, as this would have compromised the Respondent's efforts to keep the whole layoff confidential so as not to affect the elections. In any event, Hoeschen had personal knowledge of the painters, and she was under no legal obligation to take into account any person's opinion other than her own.

Significantly, the weld/fab leads did have indirect input into the layoffs by virtue of having completed a cross-training matrix back in February. Although they did not place actual number ratings on the matrix, they did mark where each employee was cross trained. Hoeschen merely filled in a 1 to 4 score in each box where the employee had been cross trained. There is no evidence in the record to suggest that the leads did not accurately note where employees were cross trained.

Although the weld/fab leads apparently believed that by placing an x in a specific box on the matrix, they were indicating that the employee could "train the trainer," and Hoeschen believed that it simply meant they were proficient, there is no evidence that this miscommunication/misunderstanding had any impact on the selection of who would be laid off. Nor is it indicative of animus. The fact is that most employees received a rating of "3" wherever they were cross trained, and that only a few received any ratings of "4." Whether Hoeschen's ratings were right or wrong is beside the point and not within the Board's purview. The question is whether her ratings were honestly held or

instead were discriminatorily motivated. Hoeschen testified that these were her honest opinions, and the record fails to show otherwise. The General Counsel's evidence regarding performance was limited to two painters (Kostal and Andrews) and two welders (Kossow and Knight). This evidence consisted primarily of these employees' self-serving testimony as to their own abilities in comparison to the abilities of other employees. The self confidence of Andrews, who proclaimed himself to be the best painter by far, is commendable, but it hardly constitutes substantial evidence to show that Hoeschen was discriminatorily motivated. And in the case of Kossow and Knight, their testimony was painful to elicit and substantially corroborated the matrix. Neither contended that he was cross trained in some area not marked on the matrix. The only possible quibble is with the actual rating in each category. But even if Hoeschen had given them the highest possible rating in each category where they were cross trained, they still would have been laid off. The problem for each was the limited areas in which they had worked compared to other employees. It certainly is not discriminatory for an employer to value more highly those employees who can work in multiple areas, particularly in the context of a reduced work force.

As for the paint department matrix, Respondent did look at various iterations of the matrix, but with one exception, the actual ratings never changed. The sole exception was Dennis Feltus, who was initially rated by Hoeschen in only three areas, but who was subsequently given ratings in five additional areas. This bump in his ratings, however, did nothing to help Feltus, as he remained one of the lowest rated painters and was laid off in the first round of layoffs.

The General Counsel relies upon one iteration of the paint department matrix, which included seniority as one of the factors. The seniority factor was subsequently removed. The General Counsel argues that this change resulted in Kostal being laid off. But that is true only if one looks at the total "un-weighted" score. Respondent never considered weighting every category equally, as the work that would remain would be primarily in the small paint booth. Thus, the small paint booth was weighted more heavily, and certain more peripheral functions such as sanding and touch-up were weighted the least heaviest. In the case of seniority, Respondent, in one iteration of the matrix, rated the eleven painters from one to eleven, with an eleven being given to the most senior painter and a one being given to the least senior painter. It then applied a 50% weighting factor, so that the lowest score was 0.5 and the highest score was 5.5. Eventually, the Respondent decided to eliminate the seniority column and use it solely as a tiebreaker, partly because even applying the 50% weighting factor, it weighted seniority on an uneven basis. Thus, whereas every other category was weighted from 0 to 4 points, a range of 4 points, seniority had a range of 5 points. Without weighting seniority, the range would have been 10 points.

The contention that this change adversely affected Kostal does not hold up. Even keeping seniority in the matrix and applying the 50% weighting factor, the same six painters (including Kostal) would have been laid off. If Respondent was looking to layoff Kostal, it did not need to eliminate the seniority column. It could have kept the 50% weighting, and Kostal would still have been laid off. The fact that in filling out the matrix, Respondent totaled up both the weighted score and the unweighted score simply

indicates that Respondent gave consideration to various methods before settling on a particular method.

While it might seem superfluous to designate seniority as a tiebreaker when there were no ties, there is a difference between process and results. There are other columns that could have been deleted without affecting the actual results, such as preventative maintenance and viscosity checks, but to do so would distort the process. There were three painters who were on the borderline between layoff and retention—Curtiss, Andrews, and Kostal. In fact, Andrews and Curtiss were separated by only 0.1 points, which was certainly "close" and what one might call a virtual tie. Of the three, Curtiss was the most senior; in fact, he was the second most senior painter behind only Kerry Esler.

Further, Respondent's employee handbook specifies that seniority is one of many factors that Respondent considers in making layoffs. It is not the determining factor. Schultz, who had worked at a number of Terex facilities before coming to Grand Rapids and had been involved in layoffs at these facilities, testified that seniority had historically been used solely as a tiebreaker. (Tr. 1816-17).

The only other iteration of the matrix that would have altered who was laid off was the earliest version, which simply totaled up the scores without applying any weighting. This resulted in Andrews scoring one point higher than Curtiss and would have flipped their positions. But again, Respondent never seriously considered weighting everything equally. Further, while Andrews may have been a union supporter, so too was Curtiss, and the record fails to establish any reason why Respondent would have viewed

Andrews less favorably than it viewed Curtiss. In fact, given that the vote count was ten to one in favor of the Union, with the lone vote for Respondent being its observer, Mitch Johnson, any system that Respondent had used was bound to impact union supporters.

The record fails to establish that Respondent discriminated in the selection of employees to be laid off.

H. Respondent Lawfully Reclassified Brandon Rajala And Mike Willson

The General Counsel's theory regarding Rajala and Willson is difficult to decipher. They, along with a number of other employees, were permanently reclassified at the time of the June 26 layoff and their pay was reduced to the rate of their new position effective July 7. All that happened in September was that Rajala and Willson were moved over to undercarriage to fill a need there. No change to their pay occurred. Rajala and Willson were treated the same as all other employees who were permanently transferred. Although Respondent had been maintaining their pay when the transfers were deemed "temporary," it was clear at the time of the layoffs that the transfers would be permanent. There is nothing unlawful in an employer adjusting an employee's pay when he moves from one position to another. Respondent requests that this allegation be dismissed.

REMEDIAL ISSUES

STATEMENT OF FACTS

Respondent has recognized the Union as the exclusive representative of the paint department employees, and the parties are engaged in bargaining for a collective bargaining agreement. [Resp. Exhs. 5, 6, 7, 8, 9, 10, 11.]

The Union filed unfair labor practice charges in July. The initial complaint was issued on September 26. Shortly thereafter, Terex advised employees of the complaint allegations and took affirmative steps to reassure employees that there would be no repercussions if employees ultimately voted to unionize.

On October 7, George Ellis sent a letter to all employees. [Resp. Exh. 3]. In this letter, Ellis stated, "So that there are no misunderstandings, I want to give you the following emphatic assurances:

> Terex will not close, or threaten to close, the Grand Rapids facility, or any other facility, because team members engage in union activity or select a union to represent them. All business decisions regarding any facility will be based solely upon lawful economic and business considerations.
>
> Terex will not move or withhold, or threaten to move or withhold, work, because team members engage in union activity or select a union to represent them.
>
> . . . .

Ellis went on to state that "Terex respects the right of team members to choose in a secret ballot election whether or not to be represented by a union" and that Terex was bargaining in good faith with the Union in the painters unit and would "bargain in good faith with any union that is selected by Terex team members in a lawful secret ballot election."

On October 13, DiBiagio conducted a town hall meeting with employees. Most of the meeting concerned ongoing business issues, but at the end of the meeting, DiBiagio addressed the complaint allegations. DiBiagio read power point slides in which he gave similar reassurances to those given by Ellis in his letter. [Tr. 1626-1628; Resp. Exh. 52.]

On December 22, Terex and Manitex formed a joint venture, whereby Manitex is the majority shareholder (51%) of the Grand Rapids facility and primarily responsible for the operation of the facility.

STATEMENT OF ISSUES

1. Assuming that violations are found, whether a *Gissel* bargaining order should be granted?

2. Assuming that the outsourcing violated the Act, what is the appropriate remedy?

3. Are *Bannon Mills* sanctions warranted?

ARGUMENT

As set forth above, Respondent contends that it has committed no violations of the Act. Accordingly, no remedies are appropriate. The discussion below, however, assumes, *arguendo,* that serious violations are found.

A. A Gissel bargaining Order Is Unwarranted

"The preferred method of selecting a representative under the Act is an election." *NLRB v. Cell Agricultural Manufacturing Co.,* 41 F.3d 389, 395-397 (8th Cir. 1994). Although the Supreme Court has approved the Board's use of remedial bargaining orders in certain extreme circumstances, *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), such

orders are "disfavored." ***Be-Lo Stores v. NLRB,*** 126 F.3d 268, 273 (4th Cir. 1997). "[A] bargaining order is not a snakeoil cure for whatever ails the workplace; it is an extreme remedy." ***Douglas Foods Corp. v. NLRB,*** 251 F.3d 1056, 1065 (D.C. Cir. 2001) (quoting ***Avecor, Inc. v. NLRB,*** 931 F.2d 924, 938-39 (D.C. Cir. 1991), ***cert. denied,*** 502 U.S. 1048 (1992). A Gissel bargaining order is reserved for only the most unusual cases." ***Overnite Transportation Co. v. NLRB,*** 280 F.3d 417, 436 (4th Cir. 2002)(en banc) (quoting ***Be-Lo Stores, supra,*** 126 F.3d at 273 (4th Cir. 1997).

"The courts have been strict in requiring the Board to justify ***Gissel*** bargaining orders, in part, because employees lose the ***final say*** over whether to endorse or reject unionization with the issuance of a bargaining order" and "this final choice is a core right under the NLRA." ***Skyline Distributors, Division of Acme Markets, Inc. v. NLRB,*** 99 F.3d 403, 411 (D.C. Cir. 1996) (emphasis included). "While we accord the Board respect as to its choice of remedies because of its presumed expertise, . . . we 'exercise less deference' and require scrupulous specificity from the Board when it issues mandatory bargaining orders on the authority of ***NLRB v. Gissel Packing.***" ***Be-Lo Stores,*** 126 F.3d at 274 (citations omitted).

"The required analysis must contain 'an explicit balancing of three considerations: (1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." ***Cogburn Health Center, Inc. v. NLRB,*** 437 F.3d 1266, 1273 (D.C. Cir. 2006). Further, the Board must reconcile "prior decisions in which no bargaining order was issued despite what certainly seem to have

been equally serious if not more serious threats to the election process." *Peerless of America, inc. v. NLRB,* 484 F.2d 1108, 1119 (7th Cir. 1973); *accord, NLRB v. Gibson Products Co. of Washington Parish, LA, Inc.,* 494 F.2d 762, 766 (5th Cir. 1974) (Board must "distinguish factually similar cases with contrary results.") Like almost every other court that has decided the issue, the Eighth Circuit has rejected the Board's position that it is free to disregard subsequent developments in determining the propriety of a bargaining order. "Whether a Gissel order is appropriate must be judged in light of conditions existing at the time the Board entertained the matter." *Curlee Clothing Co. v. NLRB,* 607 F.2d 1213, 1216 (8th Cir. 1979).

1. No Card Majority Exists In An Appropriate Unit.

The initial premise of the General Counsel's request for a *Gissel* bargaining order is that 26 employees in a unit of 41 assemblers signed authorization cards prior to any unfair labor practices. There are two problems with this premise. First, the assembler unit is patently inappropriate under Eighth Circuit precedent and must include employees from a number of other departments, thereby eliminating any majority support. Respondent recognizes, however, that the Board has determined that the unit is appropriate and it denied Respondent's request for review. Respondent renews its argument that the unit is inappropriate and must include employees from multiple other departments; however, inasmuch as the ALJ is bound by the Board decision, we will not discuss it further in this brief.

The second issue concerns the validity of the cards for *Gissel* purposes. Because the unit (as found by the Board) includes 41 employees, at least 21 cards must be found

valid in order for the Union to have achieved a majority at some point in time. If 6 or more cards are invalidated, a *Gissel* order cannot be sustained. We start with the cards themselves. The cards used by the Union and relied upon by the General Counsel are not the "single purpose" cards referenced by the Board in *Cumberland Shoe Corp.,* 144 NLRB 1268 (1963) and approved by the Supreme Court in *Gissel*. In *Cumberland Shoe,* the card authorized the union to act "as a collective bargaining agency in all matters which pertain to rates of pay, wages, hours and all other conditions of employment, including the signing of an agreement with my employer." *Id.* at 1277 n. 7. The cards contained no language indicating any other purpose of the card. In contrast, here, the card states on its face that it will be used only for one of two purposes: (1) "to gain voluntary recognition from the employer" or (2) "to gain an election through the National Labor Relations Board." The card then states that it also may be used for "both" purposes. Thus, it clearly is a dual purpose card. In *Gissel,* the Supreme Court expressly refrained from making any decision "as to the conflicting approaches with regard to dual-purpose cards." 395 U.S. at 606.

Although the Board has not ruled out the use of dual-purpose cards for *Gissel* purposes, such cards are clearly disfavored. *See Nissan Research & Development, Inc.,* 296 NLRB 598, 602 (1989) ("Like my colleagues, I would prefer that unions use single-purpose authorization cards") (Member Cracraft dissenting). Member Cracraft's suggestion in *Nissan* that the best solution to the problem might be "to affirmatively state that henceforth we will use only single-purpose cards to assess the union's majority for purposes of *Gissel* bargaining," *Id.* at 600 n. 7, makes considerable sense and Respondent

endorses that approach. The Board has not yet adopted this suggestion, but it has closely scrutinized dual-purpose cards. In *Nissan,* it refused to rely upon cards that stated on one side that the signer authorized the union to represent him/her in collective bargaining, but stated on the opposite side that its purpose was "to have a Board-conducted election." The Board found this card to be inherently ambiguous and that the burden was upon the card solicitors to clarify that ambiguity. Because no such clarification had been provided, the Board found the cards insufficient to establish majority status. The Board stated its agreement with the Fifth Circuit's observation that "if unions wish to perfect their majority claims on the basis of authorization cards they should do so with cards which clearly state their purpose." *Id.* at 599 (quoting ***NLRB v. J.M. Machinery Corp.***, 410 F.2d 587, 593 (5th Cir. 1969)).

Similarly, in ***John S. Barnes Corp.***, 180 NLRB 911, 913 (1970), ***enf'd***, 77 LRRM 2372 (D.C. Cir. 1971), the Board found ambiguous a card stating at the top that in order to obtain a secret-ballot election one-third of the employees must sign and return the card and stating at the bottom:

> I hereby authorize the International Association of Machinists to represent me in collective bargaining on wages and working conditions. It is my understanding that I will be invited to join should the union be elected to represent me.

Because "the cards do not clearly and unambiguously authorize the Union to represent the signers thereof for collective-bargaining purposes," the cards could not be counted for purpose of assessing the Union's majority status.

Like the cards in *Nissan* and *John S. Barnes*, the cards relied upon by the General Counsel here are inherently ambiguous. A reasonable person reading this card could easily conclude that it would be used to obtain (1) "voluntary recognition" from the Respondent and/or (2) an election and for no other purpose. In fact, however, these cards are being used here for neither purpose. Rather they are being used to support a Board order compelling recognition of the Union in the face of an election loss. "It would be very simple for the union to prepare a card that in an unambiguous form would authorize union representation as a bargaining agent. If the union also wished to have cards signed to call an election this would be a very simple matter. There can be little excuse for combining the two in a card that make possible" a misrepresentation or misunderstanding. *NLRB v. Peterson Brothers, Inc.*, 342 F.2d 221, 225 (5th Cir. 1965).

It is anticipated that the General Counsel will rely upon *Mayfield Produce Co.*, 290 NLRB 1083, 1088 n. 16 (1988) to contend that the card used by the Union is not ambiguous. In *Mayfield*, the card, after stating that the employee authorized the union to represent him, stated that "[t]his card is for use in support of the demand of Teamsters Local Union 525 for recognition or for an N.L.R.B. election." There are subtle, but significant, distinctions in the cards relied upon by the General Counsel here:

> I understand that this is not an application for membership and that this card may be used to gain voluntary recognition from the employer or to gain an election through the National Labor Relations Board or both.

First, in *Mayfield*, unlike here, the card did not limit the circumstances in which recognition might be achieved to those in which the employer *voluntarily* recognized the

union. There is a significant difference between voluntary recognition and a *Gissel* bargaining order. Second, the card in *Mayfield* drove home the possible involuntary nature of the recognition that might be achieved by asserting that the union would "demand" recognition. The cards relied upon by the General Counsel here use the less forceful words "to gain voluntary recognition from the employer." It is also noteworthy that in the two Board decisions cited by the ALJ in *Mayfield* as support for his conclusion that the card was unambiguous, the cards contained no reference at all to the possibility of an election.

What we have here is a card that sets forth two and only two possible uses; yet the General Counsel relies on them for a third undisclosed purpose, i.e., judicially compelled recognition over the employer's vehement objection and following a secret-ballot election in which a majority of employees voted against union representation. Under no plausible interpretation of the union cards can one conclude that a majority of the employees consented to such a result.

It is anticipated that the General Counsel will argue that the card is unambiguous because it does not state that the card will ***only*** be used to obtain an election. Any such contention lacks merit because it conflates the standard for invalidating single-purpose cards with the standard for validating dual-purpose cards. The two are not the same. In *Gissel,* the Court found that a person should be bound by the clear language of the card he or she signed when the card itself speaks solely of one purpose. In this context, the card can be invalidated only by establishing that the employee was told by the solicitor to ignore the card and that its ***sole*** purpose was to get an election. In the context of dual-

purpose cards, however, the ambiguity in the card reverses the standard and places the burden on the solicitor to tell the employee that an election may not occur.

The evidence proffered by the General Counsel falls well short of clarifying the ambiguity in the cards or establishing that employees understood the possibility of compelled recognition. In fact, only 7 of the 26 card signers (Lake, Witte, Peterson, Baker, Broking, Lexvold, and Wiese) actually testified regarding the cards they signed. Even if we assume that their testimony is sufficient to find that they understood how the cards might be used, these 7 employees represent a distinct minority. There is no evidence that the solicitors of the other employees said anything that would clarify the ambiguity in the card.

Further, even unambiguous cards that purport to designate a union as an employee's bargaining representative are invalid if the designation is cancelled "with words calculated to direct the signer to disregard and forget the language above his signature." *Gissel, supra,* 395 U.S. at 606. Mike Kossow, who solicited ten cards, testified that he told employee Ken Grife that the card "really didn't mean a thing and if he was to come to a vote with the Union, he could vote either way, it was his decision yes or no." [Tr. 949-950). Telling an employee that the card does not mean anything and that he could vote yes or no clearly cancels out any language on the card to the contrary. Grife's card is not valid. (GC Exh. 45(z)). Kossow also testified that when he solicited a card from Pat Stuber, "I just started to tell him that it was -- the card was just for information for the Boilermakers, stating that he was interested in it, and that's when he interrupted me and asked for the card and he needed to hurry up because he had to pick

his kids up." Stuber then signed the cards, apparently without reading it. (Tr. 944). Telling an employee that the card is just for information clearly cancels out any contrary language on the card. Stuber's card is not valid. (GC Exh. 45 (w)). It also is reasonable to assume that Kossow told the other employees whose cards he solicited the same things that he told Grife and Stuber. Moreover, three of the cards (Miranda Clark, Shane Hamilton, Pat Stuber) relied upon by the General Counsel fail to identify Respondent as their employer, or any employer at all. (GC Exhs. 45 (f), (g), (w)). None of these employees testified in the administrative proceeding. A card that does not identify the employer with whom the union is authorized to bargain cannot be counted toward the union's majority. Respondent further contends that the cards of John Brohman and Brandon Jensen were not properly authenticated and may not be counted, (GC Exhs. 45(l), (m)).

It is also significant that the Union initiated its organizing campaign in late February and it collected 20 signed authorization cards before going public with the campaign on April 7. The last of these cards was signed on April 5. Thus, 20 employees signed cards before Respondent was even aware of an organizing drive and before Respondent provided any information in opposition to the Union's claims to the employees. The Union collected 3 more authorization cards before it filed a representation petition on May 9. Between April 7 and June 18, Respondent conducted a series of meetings with assembly employees and provided lawful facts and opinions regarding unions and unionization. Respondent committed no unfair labor practices

during this 10-week period. The alleged unfair labor practices all occurred in the one-week period between June 19 and the election on June 25.

There is no evidence as to employee sentiments on June 18, the day before the alleged unfair labor practices. What we know is that between February 28 and April 5—between twelve and seventeen weeks before the assembly election—26 employees signed union authorization cards. We know that between April 16 and June 18, these same employees were provided extensive lawful information regarding unions. We also know that of the 26 cards ultimately collected by the Union, only 3 were collected within 30 days of the election. Finally, we know that only 15 employees actually voted for the Union in a secret-ballot election on June 25. What we don't know are the reasons that some (but not all) employees who signed cards later decided to vote against the Union. Had a majority of the cards been collected in close proximity to the alleged unfair labor practices, perhaps the Board might be warranted in inferring a causal connection between the alleged unfair labor practices and the subsequent election loss. But here, it is at least equally likely that the employees who signed a card but later voted against the Union did so because upon receiving lawful information regarding unions from Respondent, they decided that they preferred not to have a union represent them. To rely upon cards that were more than twelve weeks old to infer majority status is akin to relying on a political poll conducted twelve weeks before the election. Both are highly unreliable.

2. A *Gissel* Bargaining Order Is Unwarranted.

Even assuming that there are sufficient valid cards to establish the Union's majority status prior to the election, the facts of this case do not support the extreme

remedy of a *Gissel* bargaining order. It is not sufficient to label the statements made by DiBiagio and Ellis label as "threats of plant closing" or to characterize them as "hallmark" violations. If Respondent's statements were "threats," which Respondent denies, even the General Counsel concedes that they were less than explicit, and were in the context of other statements explaining the difficult economic situation facing Respondent. Of course, an implied threat can violate the Act as can an explicit threat, but in determining flagrancy, the two are not equivalent. In recent years, after repeated rejections of its bargaining orders from the courts of appeals, the Board has become far more circumspect in its use of Gissel bargaining orders. Further, there are numerous recent cases where the Board has refused to issue a bargaining order in situations at least as egregious, if not more egregious, as those alleged here.

In *Desert Toyota,* 346 NLRB 118 (2005), *rev. den.*, 265 Fed. Appx. 547 (9th Cir. 2007), the Board declined to issue a *Gissel* bargaining order even though the employer unlawfully discharged the leading union advocate in a unit of only 31 employees and committed a number of other unfair labor practices, including maintaining an overly broad no-solicitation rule, coercively interrogating employees, and indicating that an employee had been discharged because of his union activities.

In *Jewish Home for the Elderly of Fairfield County,* 343 NLRB 1069 (2004), *enf'd*, 174 Fed. Appx. 631 (2d Cir. 2006), the Board refused to issue a *Gissel* bargaining order despite unlawful threats of plant closing by the employer's president and other high-ranking managers and numerous other unfair labor practices including the following: denying off-duty employees access to the cafeteria, maintaining unlawful rules

restricting discussion of wages and terms of employment, engaging in surveillance, assisting employees in withdrawing authorization cards, interrogating employees, granting wage increases, requiring employees to engage in antiunion activities, and discriminating against prounion employees.

In *Desert Aggregates,* 340 NLRB 289 (2003), the Board rejected a requested bargaining order in a unit of 11 employees despite finding that two employees were unlawfully laid off and the unlawful solicitation of grievances. *See also, Cardinal Home Products, Inc.*, 338 NLRB 1004 (2003), (Board refused to issue a bargaining order in a unit of 60 employees even though the employer committed two hallmark violations—unlawfully discharging an employee and unlawfully promoting 5 temporary employees to permanent status—as well as numerous other serious unfair labor practices); *Wake Electric Membership Corp.*, 338 NLRB 298 (2002); (Board declined to issue a bargaining order despite numerous serious unfair labor practices, including multiple threats to discharge individual employees, the unlawful grant of benefits to employees, and threats of futility and unspecified reprisals); *Aqua Cool,* 332 NLRB 95 (2000) (Board declined to issue a bargaining order despite finding numerous threats of plant closure and loss of benefits, as well as unlawful granting of new benefits; even though there were only 7 employees in the unit when the union requested recognition, 6 of these employees had signed union cards, and the union lost the subsequent election 8 to 1); *Yoshi's Japanese Restaurant, Inc.*, 330 NLRB 1339 (2000) (Board rejected a requested bargaining order despite threats of plant closing by the owner disseminated to more than one-half the unit and unlawfully granting wage increases to 23 employees).

The instant case simply cannot be sufficiently distinguished from these recent decisions in which the Board declined to issue a *Gissel* bargaining order. Most of the *Gissel* decisions relied upon by the General Counsel are more than thirty years old and were issued at a time when the Board took "the view that bargaining orders should be liberally granted as remedies despite evidence that a new election would suffice." *J. J. Newberry Co. v. NLRB,* 645 F.2d 148, 154 (1981). The Supreme Court's *Gissel* decision issued in 1969 and in the early years following that decision, both the Board and some courts took a more liberal view of the circumstances in which such orders were appropriate. It was not until the 1980s that the courts began more closely scrutinizing *Gissel* bargaining orders and characterizing this remedy as "extraordinary."

There are many facts that weigh heavily against issuing a bargaining order. Respondent strenuously contends that its outsourcing and layoff decisions were lawful business decisions. But even if some violation were found regarding these decisions, they had zero impact on the assembly election, did not include any eligible voters, and obviously did not affect the results of that election.

The unfair labor practices did not follow immediately on the heels of the union organizing effort, nor are they "extensive" or "continuing." Indeed, the allegations are confined to a one-week period in a lengthy campaign that has otherwise been completely clean. Second, the explicit assurances given by Ellis and DiBiagio to employees in October that the plant would not close or move if employees selected a union and that Respondent would bargain in good faith with any union selected by employees in a lawful election have effectively cleansed any taint that may have been created between

June 19 and June 24. On this issue, the Eighth Circuit's decision in *Cell Agricultural, supra,* is controlling. In that case, after unfair labor practice charges were filed, the employer's president met with employees "and told them that he was personally neutral on whether the employees should vote for the Union and that [the employer] could work with a union." The court criticized the Board for failing to give weight to this evidence and noted that "the Board should have considered any statements made to the employees by the company's manager-owners that could help to ensure a free and fair election." 41 F.3d at 399. The court opined that it saw "in the record nothing approaching a persuasive showing that a free and fair representation election could not now be held." ***Id.*** The same conclusion should be drawn here.

Further, the record reflects that Respondent has recognized the Union as the exclusive representative of the paint department employees and that the parties are engaged in bargaining for a first contract. Thus, the Union has a continuing presence in the facility and employees can readily see the results of collective bargaining. This undermines any assertion that a fair election cannot be held.

Finally, on December 22, Respondent entered into a joint venture deal with Manitex, Inc., by which Terex ceased to be the majority shareholder in the Grand Rapids facility. Going forward, Manitex will be the controlling partner. This too mitigates against the issuance of a bargaining order.

There simply is no reason why a fair election cannot be held with more traditional remedies. Further, even if it is concluded that traditional remedies are insufficient, the Board has a myriad of other special remedies in its arsenal that are quite effective without

taking away the right of employees to choose. Respondent certainly does not propose any of these remedies, but various types of access remedies have been ordered in appropriate cases. If the Board concludes that special remedies are warranted, it should look to these remedies first. The drastic and extraordinary remedy of a *Gissel* bargaining order is inappropriate and unnecessary.

B. Respondent Should Not Be Ordered To Reverse The Outsourcing Decision

The record overwhelmingly establishes that the outsourcing decision that is the subject of the complaint was motivated by lawful business reasons and wholly unrelated to union activity. However, assuming, *arguendo,* that a violation is found, Respondent contends that the remedy sought by the General Counsel is unduly onerous and burdensome and would effectively place Respondent in violation of state and federal law. In order to return the outsourced work to the plant, Respondent would have to ramp up its wet paint operations in a substantial manner. It is the wet paint operation that is the source of the zinc issue. Thus, the requested remedy would immediately increase the level of zinc discharge and place Respondent in violation of state and federal law. The only option Respondent would be left with would be to build a wastewater treatment facility at a cost of $400,000 or more. This would also cause Respondent to become a hazardous waste generator. Further, there is no guarantee that such a treatment facility will in fact resolve the zinc discharge issue. For all these reasons, the remedy requested by the General Counsel would not effectuate the purposes of the Act and would be unduly harsh and punitive. *See generally, Pertec Computer Corp.,* 284 NLRB 810 (1987); *Whitehall Packing Co.,* 257 NLRB 193 (1981).

C. Subpoena Issues

The General Counsel has sought sanctions under *Bannon Mills, Inc.*, 146 NLRB 611 (1964), against Respondent for failing to timely produce the notes of the George Ellis meeting taken by Paul Smith and Jennifer Fox. Respondent does not know precisely what sanctions the General Counsel will request. Respondent acknowledges that the notes were responsive to paragraph 1 of the subpoena and that they were not produced until the hiatus in the trial, shortly before Respondent began to present its case. The Judge has already denied Respondent the right to use the notes in support of its case, and the General Counsel was offered the ability to use the notes for impeachment or to offer them as exhibits. No such use was made. Finally, the Judge offered to delay the hearing to allow further time to prepare or to recall witnesses before Respondent presented its case. The General Counsel declined this offer, choosing instead to reserve the right to recall witnesses in rebuttal, which it did at the conclusion of the case. For reasons discussed below, Respondent contends that no further sanctions are appropriate.

Respondent sincerely regrets that the notes were not produced in a timely fashion. The undersigned counsel acknowledges negligence in failing to make sufficient inquiries prior to the trial to uncover these notes and produce them prior to trial. Contrary to any contention General Counsel may make, there was no intent to withhold.

First, there was no reason why Respondent would want to withhold these notes. It readily produced the power points of the June 19 presentation by DiBiagio which the General Counsel asserts contain numerous unlawful statements. While the notes are not in evidence, there is nothing in the record that would support a finding that the notes were

harmful to Respondent or beneficial to the General Counsel. Further, there was no discernible advantage to Respondent in waiting to produce the notes after the General Counsel's case. Perhaps the notes might contain something that the General Counsel could have used in preparing its witnesses, but it is not clear what that might be. And the Judge's offer to delay the trial and allow the General Counsel to recall witnesses gave the General Counsel the ability to supplement its evidence before Respondent began its case. Respondent certainly achieved no advantage in the presentation of its case. The notes were made available to the General Counsel and the Union before Respondent presented its case, and Respondent produced not only George Ellis as a witness, but the two note-takers, Paul Smith and Jennifer Fox. Thus, the General Counsel and the Union had the notes before these witnesses testified. All-in-all, it seems clear that the Judge's actions more than adequately remedied any prejudice that may arguably have been possible.

The failure of Respondent's counsel to uncover and produce these notes in a timely fashion was a product of an accumulation of circumstances. First, the General Counsel's complaint contained numerous allegations that covered not only the George Ellis meeting, but other employer meetings, and more importantly significant business decisions that were document intensive. Shortly before the hearing began, the General Counsel amended the complaint to include the outsourcing decision. Its subpoena was broad and 21 of the 22 paragraphs related to the challenged business decisions, not the employee meetings.

Although Respondent's counsel had some minimal assistance from another attorney in preparing the case, this was essentially a one-man show. Thus, the

undersigned counsel had responsibility not only for responding to the General Counsel's and the Union's equally broad subpoena, but for preparing Respondent's case and defenses. As a result, counsel was juggling numerous balls in the air. While the Ellis meeting may have been very important to the General Counsel and the Union, it was way down the scale of issues important to Respondent. Thus, Respondent's counsel was more heavily focused on gathering documents that were responsive to the business decisions that were being challenged. Further, Respondent's counsel had to prepare its own case. All of this is simply to say that the circumstances were hectic and ripe for overlooking something.

This is not to say that Respondent's counsel ignored paragraph 1 of the subpoena. To the contrary, Respondent produced all of the materials that were actually used in all of the employee meetings. Ellis, Smith, and Fox, however, were not located in Grand Rapids, Minnesota and had no involvement in responding to the subpoena. And because the General Counsel indicated a belief that the Ellis meeting might have been tape recorded, Respondent's counsel verified that no such recording had been made and advised the General Counsel of this fact. Further, counsel verified that Ellis had not used a script or any materials in his presentation. As acknowledged above, however, Respondent's counsel neglected to make complete inquiry regarding notes of the Ellis meeting.

The General Counsel will argue that Schultz's affidavit references possible notes by Paul Smith and that Respondent's counsel was present for this affidavit. This is true, but Schultz's affidavit was given in August, more than three months before the trial

began, and this was one short reference in an affidavit that was focused primarily on the layoffs. In preparing for the first week of the trial, Schultz's affidavit was not even on the radar of Respondent's counsel.

The General Counsel will also argue that Fox's notes were sent to Respondent's partner, Steve Schuster, back in July during the investigation of the charge. This too is true, but again, this was some four months before the trial began, and Schuster's involvement in preparing the case was limited. Schuster works out of counsel's Kansas City, Missouri office. The undersigned counsel is located in Winston-Salem, North Carolina. At the time the investigation was going on, the undersigned counsel was scheduled to go on vacation, and he requested Schuster to assist with pulling together information for Respondent's response to the charge. It was during this time period that Fox's notes were sent to Schuster. While the undersigned counsel was provided a summary of what Schuster had discovered, Fox's notes were not provided to him. Again, Respondent's focus was more heavily focused on the business decisions that were being challenged, and the Ellis meeting was but a small part of the investigation. Indeed, because there was no script for the meeting, counsel knew that credibility would be involved, and there was little point during the investigation trying to convince the General Counsel that Ellis made no threats. When the undersigned counsel returned from vacation, he resumed responsibility for the case. Schuster had no involvement thereafter except to interview possible employee witnesses, two of whom actually testified.

Although the Ellis notes are the only specific subpoena issue presented, the General Counsel and the Union made repeated accusations throughout the trial that

documents being presented by Respondent or referenced in a witness's testimony should have been furnished pursuant to the subpoena. It became apparent, however, that these accusations were baseless and that the General Counsel and the Union viewed their subpoenas as equivalent to open discovery of Respondent's case. Respondent's obligation, however, was simply to respond to the subpoena. It had no obligation to produce every document that might conceivably relate to the issues or that Respondent might wish to utilize in its case. Indeed, because the Board does not permit discovery, Respondent did not know what documents it might utilize in its defense until the trial was in progress and the General Counsel's evidence began to unfold. That is the nature of Board proceedings. Respondents can and do prepare in advance of trial, but this preparation continues throughout the trial.

The fact of the matter is that Respondent produced documents from which the General Counsel and the Union could ascertain all of the information it sought. The complaints raised during the hearing appeared to focus primarily on paragraphs 9, 10, and 15 of the subpoena. Every time Respondent sought to introduce, or a witness referenced, a document that would contain some of the information sought in these paragraphs, the General Counsel and the Union asserted noncompliance with the subpoena. Yet they already had documents that provided all of the information sought in these paragraphs. They had the financial statements for 2013 and 2014, as well as the S&OP reports back as far as they existed. These documents showed Respondent's sales, orders, revenues, profits, shipments, and production, which was what paragraphs 9 and 10 sought. As for paragraph 15, which sought overtime records for 2014, Respondent produced the actual

payroll reports for all employees in 2014. It appears that neither the General Counsel or the Union ever made any attempt to review or utilize these documents. Instead, their strategy appeared to be to try to keep out every document that was not produced in advance of the trial and that contained any information sought in the subpoena. As the General Counsel conceded at the hearing, its subpoena did not seek "all" documents that might contain pertinent information. And any such request would be unduly burdensome and objectionable.

Respondent further notes that throughout the trial, it readily responded to any request by the General Counsel or the Union seeking documents that were mentioned in testimony, even though other responsive documents had already been produced. Respondent made no effort to keep any of these documents out of evidence. Respondent further notes that it provided the responsive documents several days in advance of the hearing, when it had no obligation to do so. Respondent went out of its way to be cooperative and to keep the trial moving.

Finally, Respondent's counsel wishes to note that he has practiced extensively before the Board for more than 35 years, that he has represented respondents in countless trials, and that never in that 35-year history has there been any contention of misconduct or failure to respond to a subpoena. Indeed, the constant references to subpoena issues in this proceeding are something that Respondent's counsel has never before experienced.

The imposition of *Bannon Mills* sanctions "is a matter committed in the first instance to the judge's discretion." *McAllister Towing & Transportation Co.,* 341 NLRB 394, 386 (2004). "A *Bannon Mills*' preclusion sanction serves two related purposes. First,

to prevent a litigant who willfully frustrates discovery from gaining an unfair advantage by introducing evidence in support of his position on the factual issue for which the discovery was sought. Second, evidentiary sanctions serve to 'protect the integrity of the Board's hearing process' [citation omitted] by deterring misconduct (such as flagrant defiance of valid subpoenas) inimical to the adjudicative process." *Id.* at 402 (Member Scaumber dissenting). "Whether it be production of a document or testimony as a witness it is the ***deliberate refusal*** to timely produce or testify that is the critical element of abuse of Board subpoena process, and/or indicative of an adversary's intended imposition of an unfair evidentiary disadvantage upon his opponent." ***People's Transportation Service***, 276 NLRB 169, 224 (1985).

Respondent did not deliberately refuse to timely produce the notes of the Ellis meeting. When these notes came to counsel's attention in the course of preparing Smith and Fox to testify, counsel notified the General Counsel and the Union of the notes and provided them in advance of either witness testifying. Further any possible prejudice to the General Counsel has been remedied by the Judge's refusal to allow Respondent to rely on the notes and the offers made to the General Counsel regarding delaying the trial and/or recalling witnesses. Further sanctions are unwarranted.

CONCLUSION

Respondent respectfully requests that the complaint be dismissed in its entirety.

Respectfully submitted this 30th day of January 2015.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing BRIEF by electronic mail on the following parties:

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This the 30th day of January 2015.

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